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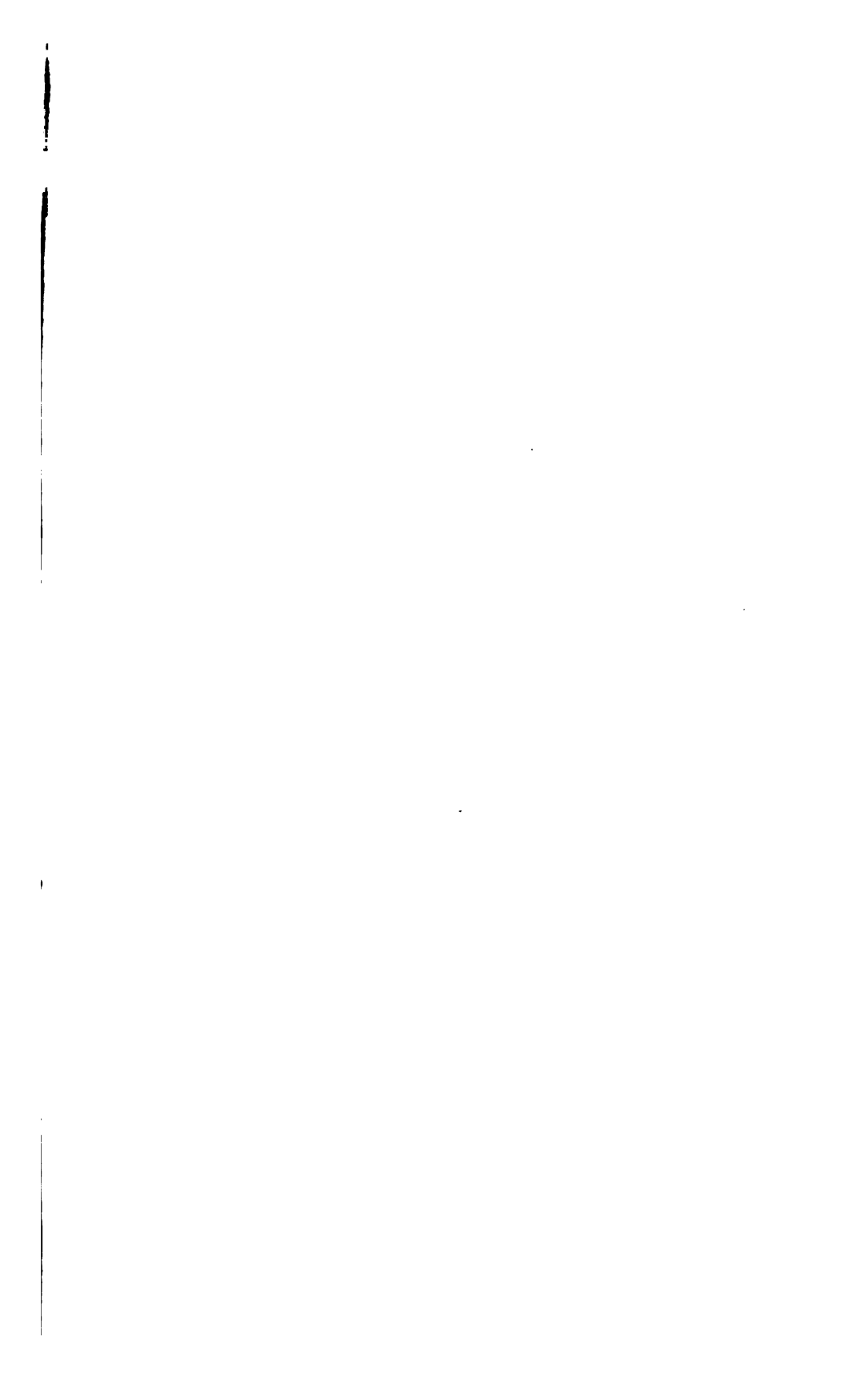
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THE
PRACTICE
OF THE
COURTS OF KING'S BENCH,
AND
COMMON PLEAS,
IN
PERSONAL ACTIONS;
AND
EJECTMENT:

TO WHICH ARE ADDED,
THE LAW AND PRACTICE OF EXTENTS;
AND
THE RULES OF COURT, AND MODERN DECISIONS,
IN THE
EXCHEQUER OF PLEAS.

IN TWO VOLUMES.

VOL. II.

BY WILLIAM TIDD, ESQ.
OF THE INNER TEMPLE, BARRISTER AT LAW.

SECOND AMERICAN, FROM THE EIGHTH LONDON EDITION, CORRECTED AND
ENLARGED.

WITH NOTES AND ADDITIONS OF THE RECENT ENGLISH AND SOME AMERICAN
CASES.

BY FRANCIS J. TROUBAT.

PHILADELPHIA:
TOWAR & HOGAN—255, MARKET STREET.

1828.

EASTERN DISTRICT OF PENNSYLVANIA, to wit :

BE IT REMEMBERED, That on the twenty-ninth day of August, in the fifty-third year of the Independence of the United States of America, A. D. 1828, **TOWAR & HOGAN**, of the said District, have deposited in this Office the title of a Book, the right whereof they claim as proprietors, in the words following, to wit :

"The Practice of the Courts of King's Bench, and Common Pleas, in Personal Actions ; and Ejectment : to which are added, the Law and Practice of Extents ; and the Rules of Court, and Modern Decisions, in the Exchequer of Pleas. In Two Volumes. By William Tidd, Esq. of the Inner Temple, Barrister at Law. Second American from the Eighth London Edition, Corrected and Enlarged. With Notes and Additions of the recent English and some American Cases. By Francis J. Troubat."

In conformity to the Act of the Congress of the United States, intituled, "An act for the encouragement of learning, by securing the copies of Maps, Charts, and Books, to the Authors and Proprietors of such copies, during the times therein mentioned ;" and also to the Act entitled "An act supplementary to an act entitled "An act for the encouragement of learning, by securing the copies of Maps, Charts and Books, to the Authors and Proprietors of such Copies during the times therein mentioned," and extending the benefits thereof to the Arts of Designing, Engraving, and Etching Historical and other Prints."

D. CALDWELL,
Clerk of the Eastern District of Pennsylvania.

CHAP. XXIX.

OF REPLICATIONS, AND SUBSEQUENT PLEADINGS.

WHEN the defendant has put in his plea, he may rule the plaintiff to reply,^a by obtaining a rule from the master, in the King's Bench, on the back of the plea; which is entered with the clerk of the rules, and a copy served on the plaintiff's attorney: In the Common Pleas, the rule to reply is given on a *præcipe*, with the secondaries; and in that court, the defendant in *ejectment* may give a rule to reply, and *non pros* the plaintiff for want of a replication,^b but can have no costs.^c This rule, the entry of which is subject to the stamp duty of half a crown,^d may be given at any time in term, or within *sixteen* days after, in the King's Bench^e or Exchequer;^f and, in the Common Pleas, when time to plead has been obtained, if the defendant plead, and give a rule to reply, before the expiration of that time, the rule to reply will be of no avail, unless he give notice of his plea.^g If the rule be not given till *four* terms have elapsed after plea pleaded, the plaintiff must have a term's notice^h of the defendant's intention to give it, unless the cause hath been stayed by injunction or privilege;ⁱ which notice must be given before the *essoin* day of the term;^k and it is usual to give the rule on the day after the term is expired.^l And where a cause has stood over for several terms, the rule to reply must be given of the term in which the judgment of *non pros* is signed.^m The rule to reply expires in four days exclusive after service, in the King's Bench; and *Sunday* or any holyday on which the court does not sit, or the office is not open, if it be not the last, is to be accounted a day within [*730] the rule.ⁿ If the plaintiff do not reply within the time limited, or obtain an order for further time, which may be obtained on a judge's summons, in like manner as an order for further time to plead, the defendant may sign a judgment of *non pros*;^o and it

^a Append. Chap. XXIX. § 1.^b *Id.* Chap. XLVI. § 72.^c 2 Blac. Rep. 763.^d *Ante*, 487.^e Imp. K. B. 345. And the practice is the same in the Common Pleas, except that after *Easter* term, the rule must be given in *ten* days. Imp. C. P. 343.^f R. H. 16 Geo. III. in *Scac. Man Ex.*

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^g 1 New Rep. C. P. 273.^h Append. Chap. XXIX. § 3.ⁱ R. T. 5 & 6 Geo. II. (b). K. B.^j 2 Str. 1164.^k Imp. K. B. 345.^l 2 Chir. Rep. 283.^m R. T. 1 Geo. II. (a). K. B.ⁿ Append. Chap. XXIX. § 4, 5.

is not necessary for him, in the King's Bench, to demand a replication, the service of the copy of the rule being deemed in that court a demand of itself:^p but in the Common Pleas, a replication must be demanded in writing, by the defendant's attorney;^q after which, if a replication be not delivered, or filed at the prothonotaries office, in due time, he may sign a judgment of *non pros*.^r And it seems that such judgment may be signed by one of two defendants in *trespass*, who has pleaded separately.^s This is a final judgment,[†] and signed on a *ten* shilling stamp;^t on which the defendant may tax his costs, and take out execution.^u

Within the time limited by the rule to reply, or order for further time, the plaintiff either moves the court to set aside the plea, if unfounded; or, admitting it to be well founded, in point of fact as well as law, he *discontinues* his action,^v enters a *nolle prosequi*,^x *stet processus*, or *cassetur billa vel breve*,^y or, in an action against an executor or administrator, takes judgment of assets *in futuro*,^z &c.; or, admitting the fact, he denies the law by a demurrer; or, admitting the law, he denies the fact, or confesses and avoids it, or concludes the defendant by matter of estoppel.

If the defendant plead in abatement after a *general* imparlance, or to the jurisdiction of the court after a *special* imparlance, the plaintiff, we have seen,^a may sign judgment, or apply to the court by motion to set aside the plea. We have also seen, that when it is doubtful whether the plea be issuable, the better way in term time, is to move the court to set it aside:^b And in general, if it be not clear that a bad plea may be considered as a nullity, the safest course is not to sign judgment, but to take issue thereon, demur, or move the court to set it aside.^c When the defendant pleads a release, fraudulently obtained from the *nominal* plaintiff, to the prejudice of the party really interested, and for whose benefit the action is brought, or from one of several plaintiffs to the prejudice of the rest, [*731] the court on motion will set aside the plea, and order the release to be delivered up to be cancelled: Thus, where the obligor of a bond, after notice of its being assigned, took a release from the obligee, and pleaded it to an action brought by the assignee, in the name of the obligee, the court of Common Pleas set the plea aside; and under these circumstances, would not allow the obligor to plead

^p Imp. K. B. 344.

^q Append. Chap. XXIX. § 2.

^r Imp. K. B. 564. Imp. C. P. 342.

^s *Philpot v. Muller*, T. 23 Geo. III.

K. B.

^t 55 Geo. III. c. 184. *Sched.* Part II. §

III.

^u Append. Chap. XXIX. § 8, 9.

^x *Id.* § 10, 11, 12.

^y *Id.* Chap. XXVII. § 4.

^z *Id.* Chap. XXIII. § 10, &c. 21, &c.

and see *Chitty on Pleading*, 1 V. p. 548.

^a *Ante*, *475. *483. (a.) 691. and see

ante, 578. 686.

^b *Ante*, 485.

^c *Ante*, 612.

† A partial judgment of *non pros* may, and sometimes can only, be signed. Thus, a defendant by mistake pleaded the general issue to three instead of four counts. Plaintiff replied; defendant then amended his plea by extending it to the 4th count. Plaintiff not having replied to the amended plea, although ruled so to do, defendant signed judgment of *non pros* to the whole action: Held, that this was irregular. Such judgment can only be signed to that part of the suit which is not actually prosecuted. 4 *Barn. & Cres.* 135.

payment of the bond.^d So, if a person who is sued by a landlord, in the name of his tenant, procure a release from the nominal plaintiff, the court will order the release to be delivered up, and permit the landlord to proceed.^e And where a landlord, with the permission of his bailiff, who had made a distress for rent, commenced an action, in the bailiff's name, against the sheriff, for taking insufficient pledges, and the bailiff afterwards, without the landlord's privity, executed a release to the sheriff, who pleaded it *puis darrein continuance*, the court of Common Pleas set aside the plea, and ordered the release to be delivered up to be cancelled.^f So, a plea of release by one of several plaintiffs was set aside by the court of King's Bench, without costs, on the terms of indemnifying the plaintiffs, who had released the action, against the costs of it, although the consent of such plaintiffs had not been obtained before action brought; it appearing that no consideration had been given for the release, and that the plaintiffs sued as trustees for the creditors of an insolvent person.^g But except a very strong case of fraud be made out, the court will not control the legal power of a co-plaintiff to release the action.^h And unless the plea be set aside, a judge at *nisi prius* has no equitable jurisdiction, and can only look to the strict legal rights of the parties upon the record: Therefore if, in an action for goods sold, the defendant prove a receipt in full signed by the plaintiff, evidence cannot be admitted, by way of answer to this defence, that the plaintiff had assigned all his effects for the benefit of his creditors, that the action was brought by his trustees in his name, that no money passed when the receipt was given, and that the plaintiff on the record and the defendant had colluded together to defeat the action.ⁱ

In *ejectment*, the plaintiff is a mere nominal person, and trustee for the lessor; and if he release the action, or if an action be brought in his name for the mesne profits and he release it, the court will *commit him for a contempt.^k It has also been determined, that [*732] the lessor of the plaintiff in ejectment, not being a party to the action, cannot release it.^l And where a landlord defrayed the costs of defending an ejectment, in the name of an illiterate tenant, who gave a *retraxit* of the plea, and *cognovit* of the action, the court set aside the *retraxit* and *cognovit*, and permitted the lessor to defend as landlord.^m

If the plaintiff perceive that he cannot maintain his action, it is usual for him to take out a rule for leave to discontinue. *Discontinuance* in a civil suit, is either of process, or of pleading: The

^d 1 Bos. & Pul. 447. and see the case of *Craig and wife v. D'Aeth*, T. 30 Geo. III. 7 Durnf. & East, 670. (b).

^e Doug. 407. and see 7 Durnf. & East, 670. (a). 1 Bos. & Pul. 448. (a).

^f 7 Taunt. 48.

^g 1 Chit. Rep. 390.

^h 7 Taunt. 421. and see 4 Moore, 192.

ⁱ 1 Campb. 392. and see 1 Chit. Rep. 391. in *notis*. 6 Moore, 497.

^k 1 Salk. 260. per *Holt*, Ch. J. But, as

was observed by *Lawrence*, J. in the case of *Bauman v. Radenius*, 7 Durnf. and East, 670. Lord *Holt* did not say that the release would not defeat the action: this therefore appears to be the most that a court of law can do, in cases of this kind: and see 1 Bos. & Pul. 448. (a). Ad. Eject. 2 Ed. 177, 8. 244, 5.

^l 4 Maule & Sel. 300. 2 Chit. Rep. 323. 8. C.

^m 7 Taunt. 9. *Ante*, 608.

former, before judgment, is the act of the clerk: but after judgment, it is the act of the court^a: the latter, of which something has been already said^b, is the act of the party. The process, or proceedings in a suit, should be regularly continued from term to term, or from one day to another in the same term^c, between the commencement of the suit and final judgment; and if there be any lapse or want of continuance that is not aided, the parties are out of court, and the plaintiff must begin *de novo*. Before declaration, there is, properly speaking, no continuance;^d though we have seen,^e that the parties by consent might have obtained a day before declaration, which was called a *dies datus prece partium*: After declaration and before issue joined, the proceedings are continued by *imparlance*;^f after issue joined, and before verdict, by *vicecomes non misit breve*;^g and after verdict or demurrer, by *curia advisari vult*.^h In the King's Bench, the practice is never to enter continuances till the plea roll is made up, though the declaration be of four or five terms standing:ⁱ And after plea pleaded, though the plaintiff have day to reply for several terms, yet no mention need be made on the roll, of any imparlance or continuance.^j After judgment by default, and writ of inquiry awarded, there is no subsequent continuance between the parties, in the Common Pleas;^k but in the King's Bench, it is otherwise [733] wise. Continuances may be entered at any time:^l And in a late case, the court granted leave to enter continuances after verdict in order to arrive at the justice of the case.^m The want of a continuance is aided by the appearance of the parties:ⁿ And as a discontinuance can never be objected *pendente placito*,^o so after judgment, it is cured by the statute of jeofails.^p It has even been holden, that a continuance may be added, after judgment in a *penal* action;^q but then, there must be something to amend by.^r

A rule to discontinue^b may be had either before or after declaration;ⁱ and it is usually granted upon payment of costs.^k An executor or administrator is liable to costs upon a discontinuance, when he has knowingly brought a wrong action;^l but when that is not the case, he may have leave to discontinue, without paying costs:^m And where, upon setting aside a verdict for the plaintiff, the costs are directed to abide the event, and then the plaintiff discontinues the action, the defendant is not entitled to the costs of the trial.ⁿ The rule to discontinue is a side-bar rule; and may be had, as a matter

^a Cart. 51. 1 Salk. 177. 1 Wils. 40. *M.* 303. cites Comyns, 419.

^b *Ante*, 713.

^c 1 Str. 492. 1 Wils. 40.

^d Gilb. C. P. 40.

^e *Ante*, 424.

^f Append. Chap. XXIII. § 6. 19. 39. Chap. XXXI. § 2. 4. 6.

^g Append. Chap. XXXI. § 42. 44. 46.

^h Append. Chap. XXIII. § 39. Chap. XXX. § 3, 4. Chap. XXXIX. § 3, 4.

ⁱ 1 Salk. 179. 2 Ld. Raym. 872. S. C.

^j 5 Co. 75. 2 Saund. 1. (2).

^k 11 Co. 6 b. Yelv. 97. 1 Rol. Abr. 486.

^l *Ante*, 182, 3.

^m 7 Durnf. & East, 618.

ⁿ 1 Wils. 40. 6 Durnf. & East, 255.

^o Cro. Jac. 211.

^p 32 Hen. VIII. c. 30. Cro. Eliz. 489.

^q Cro. Jac. 528. 3 Lev. 374. 6 Durnf. & East, 255.

^r 2 Str. 1227. 1 Wils. 125. S. C. in *Cam. Scac.* 6 Durnf. & East, 255. 618.

^s 1 Wils. 303.

^t Append. Chap. XXIX. § 6, 7.

^u R. M. 10 Geo. II. (b). K. B.

^v Comb. 299.

^w Cas. Pr. C. P. 79. Barnes, 169. S. C. 3 Bur. 1451. 1 Blac. Rep. 451. S. C.

^x 2 Str. 871. 4 Bur. 1927.

^y 1 Barn. & Ald. 566.

of course, from the clerk of the rules in the King's Bench, at any time before trial or inquiry;^o and leave has been given to discontinue after argument, and before judgment on demurrer.^p And even after a *special* verdict, the plaintiff may discontinue, by leave of the court, because that is not complete and final; but in this case it is a great favour.^q And it is never granted after a *general* verdict,^r or writ of inquiry executed and returned,^s nor after a peremptory rule for judgment on demurrer.^t In *replevin*, the avowant, though an actor, cannot have a rule to discontinue.^u

The court of Common Pleas will not permit the demandant in a writ of right to discontinue.^v And a discontinuance is not allowed in that court, after a special verdict, in order to adduce fresh proof in contradiction to the verdict.^w The plaintiff cannot have leave to *discontinue, pending a rule for judgment as in case of a [*734] nonsuit.^x And where he moved to discontinue upon payment of costs, after judgment given for him on demurrer, but not entered of record, and a writ of error brought, and bail put in thereupon, the court refused to make a rule to discontinue, without payment of costs on the writ of error.^y After notice of trial given, and regularly countermanded, the plaintiff, in the Common Pleas, obtained a rule to discontinue, upon payment of costs; and it appearing that after the notice of trial, and before the countermand, a witness for the defendant, who resided in *London*, had set out for the *York* assizes, the question was, whether the expense of this witness could be allowed the defendant in costs: The court held, that as the countermand was regular, the costs for this witness could not be allowed.^z

The rule to discontinue is obtained from the clerk of the rules in the King's Bench, or secondaries in the Common Pleas; but in the latter court, if it be after plea pleaded, the defendant's attorney must first consent to a rule in the treasury chamber in term-time, or before a judge in vacation;^a or else there must be a rule to *shew cause*. And upon a rule to discontinue, the plaintiff is to get an appointment from the master in the King's Bench, or prothonotaries in the Common Pleas, to tax the costs, and serve a copy of it on the defendant's attorney; it having been holden, that the service of a rule to discontinue, without an appointment to tax the costs, is not of itself a discontinuance of the action.^b In the King's Bench, the master will tax the costs *ex parte*, if the defendant's attorney do not attend on the first appointment.^c But in the Common Pleas, another copy of the rule must be made, in case of non-attendance, and a second appointment obtained thereon, and served as before, and so a third

^o 1 Salk. 178, 9.

^p 3 Lev. 440. 1 Str. 76. 116.

^q 1 Salk. 178.

^r *Id. ibid.*

^s Carth. 86.

^t 1 Salk. 172. and see 2 Saund. 73. (1).

^u 1 Str. 112.

^v 1 New Rep. C. P. 64. 2 New Rep. C. P. 429.

^w 2 Blac. Rep. 815.

^x Barnes, 316.

^y *Id.* 169.

^z *Id.* 307. *Sed quare*; for in a late case, the expenses of a witness, under similar circumstances, were allowed by the prothonotary; and see 1 Price, 381. *Post*, Chap. XXXV.

^a Imp. C. P. 727.

^b 6 Durnf. & East, 765.

^c Imp. K. B. 743.

time; and if he do not attend the third appointment, the prothonotaries will tax the costs *ex parte*.^f The costs being taxed, are to be forthwith paid; otherwise the plaintiff may be compelled to proceed in the action: for the rule being conditional, is no stay of proceedings; and it has been holden, that for the non-payment of these costs, the plaintiff is not liable to an attachment.^g An averment, in an action for a malicious arrest, that the suit is wholly ended and determined, is proved by evidence of the rule to discontinue upon [*735] payment of *costs, and that the costs were taxed and paid, without producing the roll, with judgment of discontinuance entered upon it.^h And where a rule to discontinue, on payment of costs, was obtained by the plaintiff on the 6th of *February*, but the costs were not taxed until the 11th of *March*; the court held, that when the costs were taxed, and the judgment of discontinuance entered up, it related back to the day when the rule for a discontinuance was obtained, and that the action was to be considered discontinued from that time.ⁱ But it seems, that a judge's order to stay proceedings on payment of costs, and proof of such payment, is not sufficient evidence that the first suit is at an end.^k And where it was averred in the declaration, that the defendant voluntarily permitted his suit to be discontinued for want of prosecution, and thereupon it was considered by the court that he should take nothing by his bill, *prout patet per recordum*, whereby the suit was ended and determined; it was holden, that this averment was not proved by the production of a rule to discontinue; but the record having been averred, ought to have been proved.^l When the rule to discontinue is obtained by unfair practice, the court will discharge it.^m

A *nolle prosequi* is an acknowledgment or agreement by the plaintiff, that he will not further prosecute his suit, as to the whole or a part of the cause of action; or where there are several defendants, against some or one of them.ⁿ

On a plea of *coverture*, &c. if the plaintiff cannot answer it, he may enter a *nolle prosequi* as to the whole cause of action; but the defendant in such case is entitled to costs, under the 8 Eliz. c. 2. § 2.^o So, if the defendant demur to one of several counts of a declaration, the plaintiff may enter a *nolle prosequi* as to that count which is demurred to, and proceed to trial upon the other counts;^p or if he join in demurrer and obtain judgment, he may enter a *nolle prosequi* as to the issue, and proceed to a writ of inquiry on the

^f Imp. C. P. 727, 8.

^g 7 Durnf. & East, 6. and see 2 Str. 1220. 3 Maule & Sel. 153. 5 Barn. & Ald. 905. 1 Dowl. & Ry. 556. S. C.

^h 4 Campb. 214. 1 Stark. *Ni. Pri.* 48. S. C.

ⁱ 1 Barn. & Cres. 649. 3 Dowl. & Ry. 2. S. C.

^k 4 Campb. 214. 1 Stark. *Ni. Pri.* 48. S. C. 1 Esp. Rep. 80. and see 11 East, 319. 2 New Rep. C. P. 473.

^l 5 Price, 540.

^m 4 Bur. 2532.

ⁿ Cro. Car. 239. 243. 2 Rol. Abr. 100. And for the nature and effect of a *nolle prosequi*, and in what cases it may or may not be entered, see 8 Co. 58. Cro. Jac. 211. S. C. Hardr. 153. 1 Saund. 207. *in notis*. 1 Ld. Raym. 598, &c. 1 Wils. 90. 3 Durnf. & East, 511.

^o 3 Durnf. & East, 511.

^p 2 Salk. 456. 1 Bos. & Pul. 157. 6 Taunt. 444. 2 Marsh. 144. S. C.

demurrer:¹ And if the plaintiff enter a *nolle prosequi* as to any of the counts in a declaration, he is not entitled to costs on such counts.² But, after a demurrer for *mis-joinder*, the plaintiff cannot cure it, by entering a *nolle prosequi*.³ And if there be a demurrer to a declaration, consisting of two counts, against two defendants, because one of them was not named in the last count, the plaintiff *cannot enter a *nolle prosequi* on that count, and proceed [*736] on the other.⁴

If there be a *demurrer* to part, and an issue upon other part, and the plaintiff prevail on the demurrer, it was in one case holden, that without a *nolle prosequi* as to the issue, he cannot have a writ of inquiry on the demurrer; because, on the trial of the issue, the same jury will ascertain the damages for that part which is demurred to.⁵ But in a subsequent case,⁶ where the declaration consisted of four counts, to three of which there was a plea of *non assumpsit*, and a demurrer to the fourth; and, after judgment on the demurrer, the plaintiff took out a writ of inquiry, and executed it: this was moved to be set aside, there being no *nolle prosequi* on the roll; and it was insisted, that the plaintiff ought to take out a *venire*, as well to try the issue, as to inquire of the damages upon the demurrer: *Sed per Curiam*, "that is indeed the course, where the issues are carried down to trial, before the demurrer is determined, and in that case the jury give contingent damages; but here, the demurrer being determined, and the plaintiff being able to recover all he goes for upon the fourth count, there is no reason why we should force him to carry down the record to *nisi prius*: and as to the want of a *nolle prosequi* upon the roll, he may supply that, when he comes to enter the final judgment; if not, the defendant will have the advantage of it upon a writ of error: The judgment upon the inquiry must stand."⁷

In *trespass*, or other action for a wrong, against several defendants, the plaintiff may, at any time before final judgment, enter a *nolle prosequi* as to one defendant, and proceed against the others.⁸ And so in *assumpsit*, or other action upon contract, against several defendants, one of whom pleads bankruptcy, or other matter in his personal discharge, the plaintiff may enter a *nolle prosequi* as to him, and proceed against the other defendants.⁹ So, in *trespass* against several defendants, where the jury by mistake have assessed several damages, the plaintiff may cure it by entering a *nolle prosequi* as to one of the defendants, and taking judgment against the others.¹⁰ But a *nolle prosequi* cannot be entered as to one defendant, after final judgment against the others.¹¹ And it seems that in *assumpsit*, or other action upon contract, against several defendants,

¹ 1 Salk. 219. 2 Salk. 456. 1 Str. 532. 7 Durnf. & East, 473. 1 Saund. 109. 574.

² 16 East, 129. 2 Marsh. 145.

³ 1 H. Blac. 108. and see 2 Chit. Rep. 697.

⁴ 4 Durnf. & East, 360. and see 1 Saund. 285. (5).

⁵ 1 Salk. 219. 12 Mod. 558. 8. C.

⁶ 1 Str. 532. 8 Mod. 108. 8. C. and see

(1).

⁷ Hob. 70. Cro. Car. 239. 243. 2 Rol. Abr. 100. 2 Salk. 455, 6, 7. 3 Salk. 244, 5. 1 Wils. 306.

⁸ 1 Wils. 89.

⁹ 11 Co. 5. Cro. Car. 239. 243. Carth.

19.

¹⁰ 2 Salk. 455.

[*737] the plaintiff cannot enter a **nolle prosequi* as to one, unless it be for some matter operating in his *personal* discharge, without releasing the others.^c So, where the plaintiff declares on a joint contract against two defendants, and one of them pleads infancy, the plaintiff cannot enter a *nolle prosequi* as to him, and proceed against the other defendant in that action; but should commence a new action against the adult defendant only.^{d†} In entering a *nolle prosequi*, the plaintiff need not be amerced *pro falso clamore*; but it is sufficient that the defendant be put without day.^e

Of a nature similar to a *nolle prosequi*, is the entry of a *stet processus*,^f by which the plaintiff agrees that all further proceedings in the action shall be stayed. This entry is usually made where the defendant becomes insolvent pending the action; and the object of it is to prevent him from obtaining judgment as in case of a non-suit.^g

On a plea in *abatement*, if the plaintiff cannot deny the truth of the matter alleged, and it is sufficient in law to quash the bill or writ, he may enter a *cassetur billa, vel breve*,^h or, in other words, pray that the bill or writ may be quashed, to the intent that he may exhibit or sue out a better bill or writ against the defendant: and upon such entry, the defendant is not entitled to costs. For the purpose of making this entry, a roll should be obtained of the term of the declaration, which is had from the prothonotaries in the Common Pleas, and the declaration and plea entered thereon: after which, the roll is taken to and docketed with the clerk of the judgments, in the King's Bench; and the master having marked the *cassetur billa* thereon, it is filed with the clerk of the treasury.ⁱ In the Common Pleas, the roll is docketed and filed with the prothonotaries.^k

In an action against an *executor* or *administrator*, if the defendant plead *plene administravit*, and it cannot be proved that he has assets in hand, the plaintiff may confess the plea, and take judgment of assets *in futuro*; which is an interlocutory or final judgment, according to the nature of the action: and if it be only interlocutory, there must be a writ of inquiry to complete it. So, in an action against an insolvent debtor or fugitive, whose future effects remain liable to the payment of his debts, the plaintiff may take judgment for his demand, to be levied of those effects.^l

^c 1 Wils. 89. and see 2 Maule & Sel. 444. 6 Taunt. 179.

^d 3 Esp. Rep. 76. 5 Esp. Rep. 47. S. P. and see 3 Taunt. 307. 4 Taunt. 468.

^e 1 Str. 574.

^f Append. Chap. XXIX. § 13.

^g 7 Taunt. 180.

^h Append. Chap. XXVII. § 4.

ⁱ Imp. K. B. 291.

^j Imp. C. P. 327, 8.

^k 1 Durnf. & East, 80. Append. Chap. XXIII. § 14.

† But in the state of Massachusetts it has been decided that in an action on a joint contract, where one of the defendants pleads infancy, the plaintiff may enter a *nolle prosequi* against him, and proceed against the other. 1 Pickering, 500. 502. On the other hand the practice in the state of New York appears to be coincident with that in the text. Thus, in assumpsit against three on a joint and several note, two pleaded that the note was fraudulently obtained, &c., whereupon the plaintiff entered a *nolle prosequi* as to them, and took judgment by default against the third: Held, that the action was discontinued as to all. 3 Cowen, 374.

A replication, denying the truth of the plea, is either in denial of the whole, or a part of it; and such denial is either direct and *immediate, or consequential to, and preceded by an inducement: the latter mode of denial is called a *traverse*.^m

When the defendant's plea consists merely of matter of fact, triable by the country, in excuse or justification of the injury complained of, as where the defendant, in trespass and assault, pleads *son assault demesne*, or justifies in an action for words, there the plaintiff may reply generally, that the defendant committed the injury of his own wrong, and without any such cause as the defendant hath alleged; which puts the whole matter of the plea in issue, and is called a replication *de injuriâ suâ propriâ, absque tali causa*.ⁿ But where the plea consists of matter of record, as well as matter of fact, or the defendant claims, in his own right, or as servant to another, any interest in the land, or any common or rent issuing out of the land, or a way or passage over it, there *de injuriâ*, &c. generally is not a good replication;^o but the plaintiff must either deny the matter of record, or traverse the title specially; or, admitting the matter of record or title, he must reply, that the defendant committed the injury of his own wrong, and without the *residue* of the cause alleged by the defendant. So if the defendant, without claiming any interest in the land, justify under an authority derived *immediately or mediately* from the plaintiff, or by authority of law, *de injuriâ*, &c. generally, is not a good replication.

When there is an affirmative and negative, either in express words or by necessary implication,^p or a complete confession and avoidance, a traverse is unnecessary and superfluous. But when there are two affirmatives which do not impliedly negative each other, or a confession and avoidance by argument only, it is necessary to add a traverse. A *traverse* is a denial of the whole, or most material point of the adversary's pleading; or, if there be several points equally material, of one of them: and it should consist of some matter of fact, triable by the country, either expressly alleged, or necessarily implied. Matter of inducement therefore, or conveyance to the action, a mere suggestion, surmise or supposal, the time and place, or what is alleged under a *scilicet*, if immaterial, is not allowed to be traversed; nor matter of law, or mere legal inference; matter of intention, which is not triable, as the *sciens* *in an action of deceit; matter of record, which is not triable [*739] by the country; or any other matter, which is not expressly alleged, or necessarily implied. But matter of inducement, &c. is traversable, if material.^q

Every traverse ought to have a proper inducement; and if that

^m For the replications usually made to pleas in different actions, see Chitty on Pleading, 1 V. p. 551, &c.

ⁿ *Crogate's case*, 8 Co. 67.

^o *Id. ibid.* and see Willes, 52. 99. 202.

^p Price, 670. Yet, where the title alleged is only inducement, *de injuriâ*, &c. generally, is a good replication. ² Saund. 295. (1.) And see further, as to

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the replication of *de injuriâ*, &c. and when allowed, or not proper or advisable, and the form of it, Chitty on Pleading, 1 V. p. 577, &c.

^q 2 Str. 1177. 1 Wils. 6. S. C.

^r See further, as to what fact may be traversed or denied, Chitty on Pleading, 1 V. p. 586, &c.

be bad, the traverse is insufficient: But the inducement to a traverse does not require much certainty; though the traverse itself should be certain, and neither too large nor too narrow, that is, it should deny so much as is material, and no more. The proper words for beginning a traverse, are *absque hoc*; but any words tantamount are sufficient, as *et non*: And it ought not to conclude to the country, unless it comprise the whole matter of the plea. There cannot be a traverse after a traverse, when the first was apt and material: but it is otherwise, when the first traverse was not to the point of the action, or immaterial: And the king is allowed to take a traverse after a traverse, when his title appears by office, or other matter of record.

The want of a necessary traverse, or a traverse that is unnecessary and superfluous, is merely form, and aided after verdict, on a general demurrer, or by pleading over. A traverse improperly taken is also aided in like manner; as where it is without an inducement, or of an immaterial point, or of one that is not the most material, or too large, or too narrow, or after a former traverse.*

If the plaintiff cannot deny the truth of the plea, he may confess and avoid it, or conclude the defendant by matter of estoppel. *Avoidance*, we have seen,[†] is either by matter precedent, which is called an avoidance in law, or by matter subsequent, which is called an avoidance in fact.[‡] And it is a rule, with regard to *estoppels*, that they should be pleaded with certainty in every particular;[§] and in pleading or replying, the party must rely upon them.*

[*740] In general we may observe, that the qualities of a replication are similar to those of a plea: therefore it should answer the whole matter alleged, and be single, certain, direct and positive, triable, and capable of proof.[†] But though a replication must not be double, yet it may contain several distinct answers to the plea: Thus, at common law, where the defendant in *assumpsit* pleads infancy, to a declaration consisting of several counts, the plaintiff may reply, as to part of his demand, that it was for necessities; to other part, that the defendant was of full age at the time of the contract; and to other part, that he confirmed it after he came of age. So, if an executor or administrator plead several judgments outstanding, and no assets *ultra*, the plaintiff may reply, as to one of the judgments, *nul tiel record*; and to another, that it was ob-

* For the above rules respecting traverses, and the cases which illustrate them, see Corn. Dig. tit. *Pleader*, (G.) &c. And see further as to traverses, when necessary, and when not; 1 Saund. 85. (1.) 133. (4.) 207. c. (3, 4, 5.) 209. (7, 8.) 2 Saund. 5. (3.) 50. (3.) what may or may not be traversed; 1 Saund. 23. (5.) 298. (3.) 312. d. (4, 5.) 2 Saund. 10. (14.) 206. a. (21, 22.) in what manner a traverse should be taken; 1 Saund. 82. (3.) 268. (1.) 269. (2.) 2 Saund. 207. a. (24.) 295. c. (2.) of a traverse after a traverse; 1 Saund. 22. (2.) and when and how the want of, or a bad or defective

traverse is aided; 1 Saund. 14. (2.) 20. (1.) See also Chitty on Pleading, 1 V. p. 586, &c.

† *Ante*, 695.

‡ See further, as to replications in confession and avoidance, Chitty on Pleading, 1 V. p. 599, &c.

§ Co. Lit. 303. a.

* 1 Saund. 325. (4.) And see further, as to estoppels, 1 Saund. 216. (2.) 2 Saund. 418. (1.) Chitty on Pleading, 1 V. p. 575, 6. *Ante*, 715.

† See further, as to these qualities, Chitty on Pleading, 1 V. p. 617, 18.

tained or kept on foot by fraud.² And to a plea of set off, consisting of several demands upon judgment or recognizance and simple contract, the plaintiff in his replication may give several answers; as, to the judgment or recognizance, *nul tiel record*, and to the simple contract, that he was not indebted, or the statute of limitations.³

At common law, when an action was brought on a bond with a penalty, conditioned for the performance of covenants, the plaintiff could only have assigned *one* breach of the condition, by which the forfeiture was incurred; for if he had assigned *several* breaches, the declaration would have been bad for duplicity; and if the issue joined on the breach assigned had been found for the plaintiff, he was entitled not only to recover the penalty, that being the legal debt, but also to take out execution for the same, although it far exceeded the amount of the damages actually sustained; and the defendant could only have obtained relief in a court of equity. For preventing these inconveniences, to the plaintiff as well as to the defendant, it was enacted by the statute 8 & 9 W. III. c. 11. § 8. that "in all actions upon any bond or bonds, or on penal sum, for non-performance of any covenants or agreements, in any indenture, deed or writing contained, the plaintiff or plaintiffs may assign as many breaches as he or they shall think fit; and the jury, upon the trial of such action or actions, shall and may assess, not only such damages and costs of suit as have heretofore been usually done in such cases, but also damages for such of the said breaches, so to be assigned, as the plaintiff, upon the trial of the issues, shall prove to have been broken; and that the like judgment shall be entered on such verdict, as heretofore hath been usually [*741] done in such like actions." This statute, we have seen,^b is *compulsory* on the plaintiff, to proceed in the method it prescribes: and under it, the breaches may either be assigned in the declaration, or in the replication. It was not formerly usual to assign them in the declaration; but this is now commonly done, for avoiding the necessity of a suggestion after judgment on demurrer, or by confession, or *nil dicit*, or after a plea of *non est factum*, &c.: And where they are so assigned, the defendant may deny the truth of them in his plea; and, if necessary for his defence, may plead several matters. But when the breaches are not assigned in the declaration, the usual course of pleading is, for the defendant in his plea to set out the condition, and plead performance generally; upon which the plaintiff *assigns* the breaches in his replication;^c or they may be *suggested* at the end of it.^d In *debt* on bond, conditioned for the payment of mortgage money, when the defendant pleads that he paid the money according to the condition, the plaintiff in

^a 1 Saund. 337. *b.* (2). and see 1 Salk. 298. 1 Ld. Raym. 263. S. C.

^b Chitty on Pleading, 1 V. p. 551, 2.

^c *Ante*, 633.

^d *Per Chambre*, J. 5 Taunt. 390. 1 Marsh. 97. S. C. 2 Chit. Rep. 298. (*a*). And see Com. Dig. tit. *Pleader*, F. 14. and the authorities there cited; by which

it seems, that at common law, where a breach was not admitted by the plea, the plaintiff must have assigned it in his replication, and concluded with a verification, so as to give the defendant an opportunity of answering it.

^a 2 Chit. Rep. 298.

his replication may take issue thereon, and conclude to the country, without assigning any further breach:^e And in general, the breaches are held to be sufficiently assigned, though they are not said in terms to be *according to the form of the statute*.^f After a plea of *non est factum*,^g or that the bond was obtained by fraud,^h &c. when the breaches are not assigned in the declaration, the plaintiff, in the King's Bench, is allowed to *suggest* them, in making up the issue; and proceed to assess damages thereon, at the time the issue is tried. This suggestion may be entered at any time before the trial; though where the issue has been previously made up and delivered on such plea, it is irregular to deliver a second issue with a suggestion, without a summons and judge's order.ⁱ And in a late case,^k leave was given by the court of King's Bench to the plaintiff, in *debt* on bond conditioned to perform an award, after judgment for him upon a plea of judgment recovered, and writ of error allowed, to execute a writ of inquiry upon the above statute, and to sign a new judgment, on the terms of paying costs, and putting the [*742] defendant **in statu quo*, &c. But, in the Common Pleas, on a plea of general performance, if the plaintiff, instead of *assigning* breaches in his replication, deny the performance, and conclude to the country, and then *suggest* breaches of the condition, it is bad on demurrer; and if the defendant do not demur, but take issue and go to trial on the question of performance, the court will after verdict award a repleader.^l

In order to avoid duplicity, when a party is to answer two matters, and yet by law he can only plead or reply to one of them, he may *protest* against the one, and plead or reply to the other: as where a delivery and acceptance are stated, of money or goods, &c. he may protest against the delivery, and take issue on the acceptance; or if a defendant plead that he is seised in fee of land, and prescribe for common of pasture, &c. the plaintiff in his replication may protest against the seisin, and take issue on the prescription. This is called a *protestation*, or, from the *gerund* used in making it when the proceedings were in Latin, a *protestando*; and is defined to be a saving to the party who takes it, from being concluded by any matter alleged, or objected against him on the other side, upon which he cannot take issue.^m A *protestando* is said by Lord Coke to be an exclusion of a conclusion; or a safeguard to the party, which keepeth him from being concluded by the plea he is to make, if the issue be found for him:ⁿ And where it is doubtful whether a pleading be good, it is usual for the opposite party to protest that it is insufficient in law, before he answers it. But that which is the

^e 5 Moore, 198. and see 2 Chit. Rep. 697. and the cases there cited.

^f 13 East, 3. and see 5 Durnf. & East, 540.

^g 8 Durnf. & East, 255. and see 1 Esp. Rep. 277. Append. Chap. XXXI. § 9.

^h 5 Maule & Sel. 60.

ⁱ 8 Durnf. & East, 255.

^k 14 East, 401.

^l 5 Taunt. 386. 1 Marsh. 95. S. C. And for the mode of proceeding in general, on the statute 8 & 9 W. III. c. 11. § 8. see 1 Wms. Saund. 58. (1). 2 Wms. Saund. 187. a. (2). 1 Sel. Ni. Pri. 517, &c. Chitty on Pleading, 1 V. p. 555, 6. 598, 9. Ante, 632, &c.

^m Plowd. 276. & Finch, L. 359, 60.

ⁿ Co. Lit. 124. b. Doc. Plac. 295.

ground of the party's suit cannot be taken by protestation; for it may be denied by answer, and issue may be joined upon it: as in *definue* by the executor of A., the defendant cannot take by protestation that A. did not make the plaintiff his executor, for it is the ground of the suit, and utterly destroys the plaintiff's action; and that which is the effect of the party's suit cannot be taken by protestation.* Also it is a rule, that a protestation which is repugnant to, or inconsistent with the plea, or an idle and superfluous protestation, is not good.[†]

A protestation is perfectly inoperative in the pleading in which it is used, it neither admitting nor denying any thing in that suit: *and where one pleads a plea, and takes another matter by pro- [*743] testation, and the issue is found against him, the protestation is of no service;[‡] it being a rule, that a protestation does not avail the party that takes it, if the issue be found against him, but only prevents a conclusion where the issue is found for him, unless it be a matter that cannot be pleaded,[§] or on which issue cannot be joined;[¶] and then it shall be saved to the party protesting, though the issue be found against him.^{||}

The only additional quality required in a replication, is that it be consistent with, and do not depart from the declaration. *Departure* in pleading is, when a man quits or departs from the case or defence which he has first made, and has recourse to another; or, in other words, when the replication or rejoinder contains matter not pursuant to the declaration or plea, and which does not support and fortify it.[‡] Thus, if the declaration be founded on the common law, the plaintiff in his replication cannot maintain it by a special custom, or act of parliament.[§] So, in an action of *debt* on an arbitration bond, if the defendant plead "no award made," and the plaintiff, in his replication, set out an award, and assign a breach, the defendant cannot rejoin that the award was not tendered,[¶] or is void,^{||} or that the defendant hath performed, or been ready to perform it.^{||} So, in an action of *debt* on bond, conditioned for the payment of an annuity, if the defendant plead "no such memorial as the statute requires," to which the plaintiff replies that there was a memorial, which contained the names of the parties, &c. and the consideration for which the annuity was granted, and the defendant rejoins that the consideration is untruly alleged in the memorial to have been paid to both obligors, for that one of them did not receive any part of it; this rejoinder is bad, as being a departure from the plea.[¶] So, in an action of *debt* on bond, conditioned for the performance of covenants, if the defendant plead performance, and the plaintiff reply and

* Plowd. 276. *Doc. Plac.* 296. and see *Moor*, 355, 6. *Cro. Car.* 365. 3 *Wils.* 109, 10. 116.

† Bro. Abr. tit. *Protestation*, l. 5. Plowd. 276.

‡ Bro. Abr. tit. *Protestation*, 14.

§ Finch, L. 359.

¶ Plowd. 276. b. Co. Lit. 124. b.

|| For the several cases on this subject, see 2 *Saund.* 103. a. (1). See also 3 *Blac. Com.* 311, 12. *Reg. Plac.* 70, 71. 3 *Reeve's*

Hist. 437. *Chitty on Pleading*, 1 V. p. 589, &c.

‡ Co. Lit. 304. a. 2 *Wils.* 98. and see 2 *Saund.* 84. (1). 189. (3).

§ Co. Lit. 304. a. 1 *Lev.* 81. 3 *Lev.* 48.

¶ 1 *Lev.* 300. 2 *Saund.* 188. 8. C. 3 *Salk.* 123.

|| 1 *Lev.* 85. 127. 133. 1 *Wils.* 122.

|| 1 *Sid.* 10.

¶ 4 *Durnf. & East*, 585.

assign a breach, the defendant cannot rejoin any matter in excuse of performance.^o But where the rejoinder discloses new matter, in explanation or fortification of the bar, it is no departure.⁴ Thus, [*744] where the defendant, in an action of **debt* on an arbitration bond, pleaded "no award," and the plaintiff in his replication set out the award, and the defendant in his rejoinder stated the whole award, in which was recited the bond of submission, by which it appeared, upon the face of the award, that it was not warranted by the submission, and then demurred; the court held, that the rejoinder was not inconsistent with, nor a departure from the plea.^o In *scire facias* against bail, they pleaded that there was no *ca. sa.* against the principal, the plaintiff replied, by shewing the *ca. sa.* and a return of *non est inventus*, the defendant rejoined that the *ca. sa.* did not lie four days in the office; and this, on demurrer, was holden to be a departure; although, by the practice of the court, the proceedings were on that account irregular, and might have been set aside.^f But where bail, sued in *scire facias* upon their recognizance, pleaded that no *ca. sa.* was *duly* sued out, returned, and filed, against the principal, according to the custom and practice of the court, to which the plaintiff in his replication shewed a writ of *ca. sa.* issued into *Middlesex*, it was holden to be no departure for the defendant to rejoin, that the venue in the action against the principal was laid in *London*; for that sustains the plea.^g

Time and place, when material, cannot be departed from; as, in an action upon a bond^h or promissory note,ⁱ the plaintiff in his replication cannot vary from the day laid in the declaration. So, in an action for a local trespass, he cannot reply that it was committed at a different place. But when the time laid in the declaration is immaterial, there, if it become necessary by the defendant's plea, the plaintiff in his replication may depart from it; as in *trespass*,^k or *trover*,^l or upon a general *indebitatus assumpsit*,^m when the time becomes material by the defendant's plea of a release, tender, or the statute of limitations, &c. So, in an action for a transitory trespass, when the defendant pleads a local justification, the plaintiff, in his replication may vary from the place laid in the declaration.ⁿ The proper mode of taking advantage of a departure, is by demurrer; for if the defendant, instead of demurring, take issue upon a replication containing a departure, and it be found against him, the court will not arrest the judgment.^o

[*745] But though a departure be not allowable, yet in many actions, and particularly in *trespass*, the plaintiff, who has alleged in his declaration a general wrong, may, in his replication, after an

^o Co. Lit. 304. a. 2 Lev. 67. 1 Salk. 221, 2.

⁴ 2 Wils. 98.

^o 11 East, 188. and see 1 Barn. & Cres. 465, 6. 2 Dowl. & Ry. 472, 3. S. C.

^f 1 Wils. 334. 16 East, 41. 1 Dowl. & Ry. 50.

^g 16 East, 39.

^h 1 Salk. 222. 3 Lev. 348.

ⁱ 1 Str. 22. 2 Str. 806.

^k Co. Lit. 282. a. b. 1 Salk. 222. 2 Ld. Raym. 1015.

^l Cro Car. 245. 333. 1 Salk. 222.

^m 1 Str. 22. 2 Str. 806. 1 Lev. 110. 1 Keb. 566. 578. 10 Mod. 251. Fort. 375. 1 Barnard, K. B. 54.

ⁿ 1 Ld. Raym. 120.

^o T. Raym. 86. And see further, as to *departure* in pleading, 2 Saund. 84. d. Chitty on Pleading, 1 V. p. 618, &c.

evasive plea by the defendant, reduce that general wrong to a more particular certainty, by assigning the injury afresh, with all its specific circumstances, in such manner as clearly to ascertain and identify it, consistently with his general complaint; which is called a *new or novel assignment*.^p

A new assignment is either as to time, place, or other circumstances. With respect to *time*, when the defendant justifies under a right of common, &c. at particular times, the plaintiff may new assign the trespass at other times. So, in an action of assault and battery, if the defendant plead *son assault demesne*, and there were in truth two assaults, one of which the defendant can justify, and the other not, the plaintiff may new assign the assault for which he brought his action.^q And it seems that the defendant in such case may prove an assault on any day before the action brought; and the plaintiff cannot give in evidence an assault at another day, or at another time on the same day, without a new assignment.^r

With respect to the *place*, it is a rule, that if the plaintiff in *trespass* give it a name by his writ, the defendant cannot vary from that name; but if the writ be only general, *quare clausum fregit*, and the plaintiff give a name in his count, this shall not bind the defendant, but he may give the place another name.^s So where the plaintiff, in trespass *quare clausum fregit*, names the close in his declaration, and the defendant pleads *liberum tenementum* generally, without giving any further description of the close, the plaintiff is not driven to a new assignment; but is entitled to recover, upon proving a trespass committed in a close in his possession, bearing the name given in the declaration, although the defendant may have a close in the same parish, known by the same name.^t And it is on all hands agreed, that when the writ and count are both general, the defendant may give the place a name in his plea;^u or he may plead *liberum tenementum* generally, without giving it a name.^v But when the place is made material by the defendant's plea, he must shew it with certainty: as in *trespass*, for taking and carrying away the plaintiff's goods in *D.*, the defendant pleaded that the *locus in quo* was his freehold, and that he took the goods *damage feasant*, &c. the plaintiff demurred generally, and had judgment; for the action being transitory, there is no *locus in quo* supposed, *D.* being only alleged for a venue; therefore, if the defendant will make the place material, it must come on his part to shew the certainty of it.^w

If the defendant say, that the *locus in quo* is six acres in *D.* which are his freehold, and the plaintiff say they are *his* freehold, and in *truth the plaintiff and defendant have both six acres there, it [*746] was in one case determined, that the defendant cannot give in evidence, that he committed the trespass in his own soil, unless he give a name certain to the six acres; for otherwise, it is said, the plaintiff cannot

^p 3 Blac. Com. 311.

^q 6 Mod. 120. 2 Ld. Raym. 1015.

^r Bul. Nt. Pri. 17. and see 1 Esp. Rep.

38. but see Cro. Car. 514, 15. *contra*.

^s *Per Fairfax*, Just. 22 Edw. IV. 17.

Wille, 222, &c. 2 Blac. Rep. 1090.

^t 1 Barn. & Cres. 489. 2 Dowl. & Ryl. 719. S. C.

^u Bro. Abr. tit. *Trespass*, pl. 277. 360. 366.

^v *Id.* pl. 153.

^w 2 Salk. 453. 6 Mod. 117. S. C.

make a new assignment.* But, in a later case,* it was determined, that in trespass *quare clausum fregit* in *D.* if the defendant plead *liberum tenementum*, without giving the close a name, and issue be joined thereupon, it is sufficient for the defendant to shew any close there that is his freehold; and therefore, in that case, the better way is to make a new assignment.

As the plaintiff may new assign the trespass in a different close, so he may new assign it in another part of the same close. In the latter case, he ought to allege, in what other part of the close the defendant committed the trespass, as in the *south* or *north* part, so that the difference may be plainly perceived.^b If the defendant justify under a right of way, the plaintiff may either deny the existence of the right claimed by the defendant, or, admitting it, he may new assign the trespass, *extra viam*; or, if he be so disposed, he may deny the right, as well as make a new assignment, by saying that he brought his action, not only for the trespass attempted to be justified, but also for the other trespass *extra viam*: And where the defendant justifies under a right of common of pasture, or turbary, &c. the plaintiff may state the trespass to have been committed on other occasions, and for other purposes, than those mentioned in the plea. But where the plaintiff complains of a single act of trespass, which is justified by the defendant, the plaintiff cannot in his replication take issue upon the facts of the justification, and also newly assign either the same or different matters; such replication and new assignment being double.^c The plaintiff therefore, in such case, should either reply to the plea, or new assign the trespass, according to the facts of the case: If the plea do not contain a complete answer to the trespass, then the plaintiff should reply, by denying or confessing and avoiding it;^d but if the trespass be completely justified by the plea, the plaintiff should not reply thereto, but make a new assignment, if the facts of the case will warrant it:^e By new assigning, however, he admits that the trespass in the [*747] declaration is *answered by the plea; and therefore, unless a different trespass of the same nature can be proved, the plaintiff must fail in his actions.^f And where the declaration consisted of two counts, to the first of which there was a justification, and the plaintiff new assigned the trespass, as having been committed at a subsequent time, but failed at the trial in proving his new assignment, the court held, that he could not have recourse to the second count; for by new assigning, he admitted that he did not intend to proceed for the trespass that was justified, but to rely on his new assignment; and as there were only two trespasses, one of which was admitted to be answered, he could not avail himself of the other trespass, both on the new assignment and on the second count.^g

* Dyer, 23.

* 2 Salk. 453. 6 Mod. 119. S. C. and see Willes, 223. 7 Durnf. & East, 335. per Lawrence, J. *Atherton v. Prichard*, E. 43 Geo. III. K. B.

^b Bro. Abr. tit. *Trespass*, pl. 203.

^c 10 East, 73. 80. and see 7 Taunt. 156.

^d 16 East, 82.

* 2 Wils. 3. and see Cro. Car. 228. 2 Durnf. & East, 172. 177. 3 Durnf. and East, 292. 7 Durnf. & East, 654. 11 East, 406. 1 Bing. 317.

^f 16 East, 82.

^g 2 Durnf. & East, 176. 7. and see 1 Durnf. & East, 479. Bul. N. Pri. 17.

A new assignment, being in nature of a new declaration,¹ should be equally certain; and the defendant may answer it in the same way, either by pleading the general issue of not guilty, or a special justification.¹ But, in answer to a new assignment at a different place, he cannot say that the places mentioned in the plea and new assignment are the same;² for by new assigning, the plaintiff admits the truth of the plea, and is estopped from giving any evidence in the place stated therein; so that if the places are in truth the same, the defendant may take advantage of it on the general issue of not guilty. Neither can the defendant justify at a different place, and traverse the place mentioned in the new assignment.¹

When a replication denies the whole substance of the defendant's plea, there the plaintiff ought to tender an issue, and conclude to the country:³ and it matters not whether the replication in such case be with or without a traverse; for where a traverse comprises the whole matter of the plea, the replication may still conclude to the country.² But when a particular fact is selected and denied, the conclusion seems to depend on the form of the replication: If it be so framed, as simply to deny the fact, without any inducement or traverse, it ought to conclude to the country;⁴ but the plaintiff is not ^{*always} obliged to reply in that way, for in some cases he is [^{*748}] allowed, after a proper inducement, to traverse the fact, with an *absque hoc*;⁵ and when a particular fact is so traversed, the replication should conclude to the court, with an averment and prayer of damages, or of the debt and damages:⁶ And it is an invariable rule, that whenever new matter is alleged in the replication, it should be concluded with an averment, in order to give the defendant an opportunity of answering it.⁷ A new assignment concludes, by averring that the trespass newly assigned is another and different trespass than that mentioned in the plea; wherefore, inasmuch as the defendant hath not answered the trespass newly assigned, the plaintiff prays judgment, and his damages, &c.

In the King's Bench, when the plea was *entered* in the general issue book, or *delivered* to the plaintiff's attorney, the replication should in all cases be *delivered*, on four-penny stamped paper,⁸ to the defendant's attorney; but otherwise it should be *filed*, on paper so stamped, in the office of the clerk of the papers: And a *similiter*

¹ 1 Kenyon, 389.

² Bro. Abr. tit. *Trespas*, pl. 168. 359.

³ *Id.* pl. 3. 168. Cro. Eliz. 355. 492, 3.

⁴ *Id.* pl. 168. And see further as to *new assignments*, when necessary or not, and how made, and the pleadings thereon, 1 Saund. 299. (6). 2 Saund. 5. (3). Chitty on Pleading, 1 V. p. 601, &c.

⁵ 1 Bur. 316. 2 Bur. 1022. Doug. 94. 428. 2 Durnf. & East, 442, 3.

⁶ 1 Salk. 4.

⁷ 2 Durnf. & East, 439. and the cases there cited of *Bush v. Leake*, T. 23 Geo. III. *K. B. Slater v. Carne*, H. 25 Geo. III. *K. B.* and *Carter v. Yates*, T. 27 Geo. III.

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K. B. accord. Mulliner v. Wilkes, E. 23 Geo. III. *K. B. semb. contra.*

⁸ *Fen v. Alston*, cited in 1 Bur. 320, 21. 2 Str. 871. 2 Wils. 113. *Barnea*, 161. S. C. Doug. 428.

⁹ Same cases; 1 Bur. 319. 2 Durnf. & East, 442, 3.

¹⁰ 2 Wils. 65. Doug. 58. 2 Durnf. & East, 576. And see further, as to the mode of concluding replications, &c. and when they should conclude to the country, or with a verification; 1 Saund. 103. (1). 327. (1). 334. (9). 338. (5. 7). 339. (8). 2 Saund. 190. (5). Chitty on Pleading, 1 V. p. 614, &c.

¹¹ 55 Geo. III. c. 184. *Sched. Part II.* § III.

to the general issue must be delivered, or the defendant will be entitled to sign a judgment of *non pros*.¹ And unless the replication conclude to the country, it should be signed by counsel. In the Common Pleas, the replication is either filed in the prothonotaries office, or delivered to the defendant's attorney: And in that court, a tender of an issue in fact must be signed by a serjeant, but a joinder in issue need not.²

If the plaintiff reply, without joining issue, the defendant may be called upon to *rejoin*; or if there be a new assignment, he may be ruled to *plead* thereto, in like manner as to the original declaration. The rejoinder should be delivered, on four-penny stamped paper,³ to the plaintiff's attorney, or filed in the office of the clerk of the papers, in the King's Bench, in like manner as the replication: In the Common Pleas, it is filed with the prothonotaries. And, after a rejoinder, if the parties are not yet at issue, the plaintiff must *surrejoin*, the defendant *rebut*, and the plaintiff *surrebut*, &c. till issue is joined. The rule for these purposes is given by the master or secondaries, in like manner as the rule to reply; and if the plaintiff do not surrejoin, or surrebut, within the time limited by the rule, or [*749] order for further *time, the defendant may sign a judgment of *non pros*; and it is not necessary for him, in the King's Bench, to demand a surrejoinder, &c. the service of the copy of the rule being deemed a demand of itself: but in the Common Pleas, a surrejoinder, &c. must be demanded, before judgment is signed. If the defendant, on the other hand, neglect to rejoin or rebut, when called upon for that purpose, the plaintiff, in the King's Bench, may strike out the previous pleadings, and sign judgment by default, as for want of a plea.⁴

¹ 3 Dowl. & Ry. 1.

² 1 Bos. & Pul. 469. 3 Bos. & Pul. 171.

³ 55 Geo. III. c. 184. *Sched.* Part II. §
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⁴ 5 Durnf. & East, 152. And see fur-

ther, as to *rejoinders*, &c. 1 Saund. 318. *b*.

(1). Chitty on Pleading, 1 V. p. 627, &c.

CHAP. XXX.

OF DEMURRERS, AND AMENDMENT.

A DEMURRER admits the facts, and refers the law arising thereon to the judgment of the court:^a And it is either to the whole or part of a declaration; or to the plea, replication, &c. When there are several counts in a declaration, some of which are good in point of law, and the rest bad, the defendant can only demur to the latter; for if he were to demur generally to the whole declaration, the court would give judgment against him.^b So, if the sum demanded by a declaration in *scire facias* be divisible on the record, and there be no objection to one part of it, a demurrer which goes to the whole is bad.^c If a plea or replication, which is entire, be bad in part, it is in general bad for the whole:^d But a plea of set off, wherein the demands are divisible, and in nature of several counts in a declaration, forms an exception to this rule.^e

Demurrers are *general* or *special*:^f the former are to the *substance*, the latter to the *form* of pleading. Thus, if a defective title be alleged, it is a fault in substance, for which the party may demur generally; but if a title be defectively stated, it is only a fault in form, which must be specially assigned for cause of demurrer. Of the latter nature is *duplicit*y: and it is not sufficient to say that the pleading is double, or contains two matters; but the party demurring must specially shew wherein the duplicity consists.^g

At common law, there were special demurrers, but they were never necessary except in cases of duplicity, and therefore were seldom used; for as the law was then taken to be, upon a special demurrer, the party could take advantage of no other defect in the pleadings, *but of that which was specially assigned for cause [*751] of his demurrer: but upon a general demurrer, he might take advantage of all manner of defects, that of duplicity only excepted. And

^a Co. Lit. 71. b. 5 Mod. 132.

^b 1 Saund. 286. (9). 2 Saund. 380. (14).

1 Wils. 248. 1 New Rep. C. P. 43.

^c 11 East, 565.

^d 1 Saund. 28. (2). 337. (1). 2 Saund.

124. 1 Salk. 312. 1 Durnf. & East, 40. 3

Durnf. & East, 374. Chitty on Pleading,

1 V. p. 523, 4.

^e 2 Blac. Rep. 910.

^f Co. Lit. 72. a. And for the forms of general demurrers to declarations and pleas, &c. and joinders therein, see Appendix. Chap. XXX. § 1, 2, 5, 6.

^g R. M. 1654. § 17. K. B. R. M. 1654.

§ 20. C. P. 1 Salk. 219. Willea, 220. Cas.

temp. Hardw. 167. and see 1 Saund. 337.

b. (3).

there was no inconvenience in this practice; for the pleadings being at bar *viva voce*, and the exceptions taken *ore tenus*, the causes of demurrer were as well known upon a general demurrer, as upon a special one.^b

Afterwards, when the practice of pleading at bar was altered, this public inconvenience followed from the use of general demurrers; that the parties went on to argument, without knowing what they were to argue: and this was the occasion of making the statute 27 *Eliz.* c. 5. by which it is enacted, that "after demurrer joined and entered in any action or suit, in any court of record, the judges shall proceed and give judgment, according as the very right of the cause and matter in law shall appear to them, without regarding any imperfection, defect or want of form, in any writ, return, plaint, declaration, or other pleading, process, or course of proceeding whatsoever, except those only which the party demurring shall specially and particularly set down and express, together with his demurrer." This statute, by making known the causes of demurrer, was so far restorative of the common law:^c and as a general demurrer before did confess all matters formally pleaded, so by this statute, whenever the right sufficiently appeared to the court, it confessed all matters, though pleaded informally.ⁱ

But there were still many defects and imperfections, which were not aided as form upon a general demurrer: to remedy which it was enacted, by the statute 4 *Ann.* c. 16. that "no advantage or exception shall be taken of or for an immaterial traverse, the default of entering pledges upon any bill or declaration, the default of alleging a *proferet in curia* of any bond, bill, indenture, or other deed, mentioned in the declaration or other pleading, or of letters testamentary, or letters of administration, the omission of *vi et armis* or *contra pacem*, the want of averment of *hoc paratus est verificare*, or *hoc paratus est verificare per recordum*, or not alleging *prout patet per recordum*:^k but the court shall give judgment according to the very right of the cause, without regarding any such imperfections, omissions and defects, or any other matter of like nature, except the same shall be specially and particularly set down, and shewn for cause of demurrer, notwithstanding the same might have heretofore been taken to be matter of substance, and not aided by [*752] the statute of Queen *Elizabeth*, so "as sufficient matter appear in the pleadings, upon which the court may give judgment, according to the very right of the cause." Since the making of these statutes, the party, on a general demurrer, can only take advantage of defects in substance; and, therefore, if the defects be not clearly of that nature, it is safest to demur specially, in which case he may not only take advantage of such defects, but also of any others that are specially set down.^l The plaintiff, however, need never demur specially to a plea in abatement.^m

All demurrers, whether general or special, must be signed by

^b 3 Salk. 122.

^c Hob. 233.

^k 11 East, 516. 565.

^l 1 Saund. 337. b. (3). And see further,

as to demurrers and joinders, Chitty on Pleading, 1 V. p. 636. &c.

^m *Per Bayley*, J. 2 Maule & Sel. 485.

Ante, 690.

counsel in the King's Bench,^a or a serjeant in the Common Pleas;^a and, in the King's Bench, general demurrers to the declaration must be delivered,^b on four-penny stamped paper,^c to the plaintiff's attorney; but special demurrers, or general demurrers after special pleas, must be filed in the office of the clerk of the papers, who makes copies of them. And a general demurrer to part of a declaration, and the general issue to the rest, must, we have seen,^d be delivered to the plaintiff's attorney, and not *filed* with the clerk of the papers. In the Common Pleas, all demurrers, whether general or special, may either be filed in the prothonotaries office, or delivered to the opposite attorney.^e And when either party has demurred, he should obtain a rule from the master in the King's Bench, and enter it with the clerk of the rules, for the opposite party to join in demurrer; a copy of which rule should be duly served. In the Common Pleas, a rule to join in demurrer is given with the secondaries, in like manner as the rule to plead; and a joinder in demurrer should be demanded, before judgment; and in that court, a joinder in demurrer must have a serjeant's hand.^f The defendant, we may remember, cannot waive a general demurrer to the declaration, in the King's Bench; but a special one may be waived, after the book is made up, unless the defendant has been previously ruled, and elected to abide by it.^g In the Exchequer it is a rule,^h that "in all cases where the plaintiff demurs to the defendant's plea, replication, or other subsequent pleading, and the defendant joins in demurrer, the plaintiff shall be at liberty to enter the issue in law upon the roll, and move for a *concilium*, without giving the defendant any rule to bring in the demurrer book."

*When either party demurs, the other, in due time, joins in [*753] demurrer, and proceeds to argument; or he amends, discontinues,ⁱ or enters a *nolle prosequi*.^j

Amendments are either at common law, or by statute.^k At common law, there was very little room for amendments: for, according to *Britton*, the judges were to record the *parols*, or pleadings, deduced before them in judgment; but they were not to erase their records, nor amend them, nor record against their enrolment,^l &c. All mistakes, however, were amendable at common law, during the same term;^m and afterwards, an amendment was in some instances permitted, as in the recital of a writ, or entry of an *essoin* or continuances,ⁿ &c. So, at common law, when the pleadings were *ore tenus* at the bar of the court, if any error was perceived in them, it

^a *Per Cur. T.* 21 Geo. III. K. B.

^b *Douglas v. Child*, E. 33 Geo. III. C.

^c *Allen v. Hall*, Imp. C. P. 346, 7. S. P.

^d 1 Chit. Rep. 212. 2 Chit. Rep. 295.

^e 55 Geo. III. c. 184. *Sched.* Part II. §

III.

^f *Ante*, 724.

^g Imp. C. P. 347.

^h 2 Bos. & Pul. 336. and see 3 Bos. & Pul. 171. *in notis*.

ⁱ *Ante*, 726, 7.

^j R. T. 26 & 27 Geo. II. § 4. *in Scac.* Man. Ex. Append. 211.

^k *Ante*, 730.

^l Co. Lit. 72. a. R. M. 1654. § 17. K. B. R. M. 1654. § 20. C. P. *Ante*, 735, 6, 7.

^m 1 Str. 137.

ⁿ 4 Inst. 255. Gilb. C. P. 107.

^o 8 Co. 157. Gilb. C. P. 108.

^p Gilb. C. P. 108, 9.

was presently amended.* Afterwards, when the pleadings came to be in paper, it was thought but reasonable that the parties should have the like indulgence.[†] And hence it is now settled,[‡] that whilst the pleadings are in paper, and before they are entered of record, the court or a judge will amend the declaration,[§] plea,^{||} replication,[¶] &c. in form or in substance, on proper and equitable terms: and declarations in actions on bail bonds may be amended, in the Common Pleas, as well as any other declarations.^{||} Amendments are commonly made by summons and order, at a judge's chambers; and when the amendment proposed is material, it cannot be made by a judge at *nisi prius*.^m

The declaration may be amended, in form or in substance: and it may be so amended, even after a plea in abatement of misnomer,ⁿ or the statute of additions,^o &c. or a plea of *nul tiel record*.^p And leave has been granted, upon the application of the plaintiff, to amend the declaration after verdict, by increasing the damages laid, according to the truth of the case, as found by the jury; the former verdict [*754] being at the same time set aside, and a new trial granted, to enable the defendant to make his defence to the demand so enlarged.^q So, after a nonsuit had been set aside in *prohibition*, the plaintiff had leave to amend the suggestion, which inadvertently alleged immemorial payment of tithes to the king and his predecessors, by inserting "and to such other person or persons as had or claimed title thereto."^r And the court of Common Pleas permitted the record to be amended, and a new trial had, after nonsuit for a variance, in an undefended cause.^s But, in the King's Bench, the plaintiff was not formerly allowed to add a new count to his declaration, under pretence of amending it, after plea pleaded, or after the end of the second term from the return of the writ:^t and a new right of action was considered, in this respect, as a new count.^u Yet, where the plaintiffs declared as executors, on a promise to their testator, and issue was joined on a plea of the statute of limitations, the court of King's Bench, after two terms, permitted the plaintiffs to amend, by laying the promise to have been made to themselves:^x But the amendment in this case was under particular circumstances; and if it had not been allowed, the action would have been lost, by the

* 10 Mod. 88. 1 Str. 11.

† 2 Salk. 520. Gilb. C. P. 114, 15.

‡ 1 Salk. 47. 3 Salk. 31.

§ 1 Wils. 7.

|| Id. 223.

¶ Id. 76.

|| Barnes, 26. 114.

n 1 Stark. *Ni. Pri.* 74.

o 1 Salk. 50. 1 Ld. Raym. 669. S. C. 1 Str. 11. *Cas. temp. Hardw.* 44. 7 Durnf. & East, 698. 3 Maule & Sel. 450. 2 Chit. Rep. 8. 28. *Per Cur. H.* 32 Geo. III. C. P. Imp. C. P. 228.

q 2 Str. 739. 2 Ld. Raym. 1472. S. C. but see 1 Salk. 50. 2 Ld. Raym. 859. S. C. *Id.* 1307. *contra*.

r 1 Wils. 87. 7 Durnf. and East, 447. (d). 2 Chit. Rep. 27. K. B. and see *Cas.*

Pr. C. P. 76. Barnes, 3. S. C. *Id.* 4, 5. but see 1 Salk. 52. 6 Mod. 263. 310. S. C. *semb. contra*. See also 2 Bur. 901.

s 7 Durnf. & East, 132. and see 2 Chit. Rep. 27.

t *Franklin v. Holmes*, T. 21 Geo. III. K. B.

u 3 Taunt. 31. and see 2 Bos. & Pul. 243. 1 New Rep. C. P. 28. 9 East, 335. 1 Stark. *Ni. Pri.* 312, 13. 5 Barn. & Ald. 896. 1 Bing. 233. but see 5 Moore, 164. 2 Brod. & Bing. 397. S. C. *contra*.

x R. M. 10 Geo. II. *reg.* 2. *in notis*, K. B. 1 Wils. 149. Say. Rep. 97. 151. 234.

y Say. Rep. 234.

z 2 Str. 890. Fitzgib. 193. 1 Barnard. K. B. 408. 418. S. C. 1 Kenyon, 141.

running of the statute of limitations.⁷ It is now the practice, however, in the King's Bench, to permit a new count to be added after the end of the second term, when the cause of action is substantially the same; though not for a different cause of action.

In the Common Pleas, the course of the court formerly was, that the plaintiff might, at any time before the end of the second term, have leave to amend his declaration, by adding new counts, but not afterwards.⁸ At present, however, it is not an invariable rule in that court, that a new count shall not be added after the second term. The principle of the rule is, that as the plaintiff would have been out of court at the end of the second term, if he had not declared at all, so the court will not suffer him to declare upon a fresh cause of action, after that time has elapsed;⁹ but when the cause of action is substantially the same, a new count may be added: Therefore, where the plaintiff, having obtained leave to amend a count in his *declaration, added new counts, which contained no new cause [*755] of action, but only varied the manner of stating that which was demurred to, the court of Common Pleas would not order them to be struck out.¹⁰ So, in an action by the assignees of a bankrupt, for the rescue of goods distrained for rent due to the bankrupt, that court allowed the declaration to be amended, by adding new counts, stating the facts to have taken place in the time of the provisional assignees, though two terms had elapsed since the return of the writ, the cause of action being substantially the same.¹¹ In an action for money lost by stock-jobbing, on the statute 7 Geo. II. c. 8. the court of Common Pleas permitted the declaration to be amended, as between the plaintiff and defendant, by changing it from *assumpsit* to *debt*.¹² But where the plaintiff, having sued out process in *debt*, declared in *case*, by which the bail were discharged, that court refused to amend the declaration, by changing it from *case* to *debt*.¹³ And in an action of *debt*, to recover penalties against a sheriff's officer for extortion, on the statute 32 Geo. II. c. 28. that court will not allow the declaration to be amended, by adding new counts on the statute 23 Hen. VI. c. 9.¹⁴

In a *real* action, it is not of course to amend the declaration or count, in the Common Pleas; but the demandant ought to make out a case by affidavit.¹⁵ And the court refused to allow the demandant in a writ of right to amend the mistake of a christian name in the count, or to discontinue the suit, though an affidavit accounting for the mistake was produced.¹⁶ In a subsequent case, they refused to permit the count in a writ of right to be amended, by introducing an additional step in the descent; though it was sworn that the mistake had arisen from the demandant having been misinformed in the country, where inquiry had been made, respecting the title, and

⁷ 1 Wils. 149. Say. Rep. 235, 6. and see Barnes, 488.

⁸ Cas. Pr. C. P. 131. and see Barnes, 19.

⁹ 2 Marsh. 60. *per Gibbs*, Ch. J. 6 Moore, 490.

¹⁰ 6 Taunt. 300. 1 Marsh. 609. S. C.

¹¹ 6 Taunt. 358. 2 Marsh. 59. S. C. 6 Moore, 490.

¹² 6 Taunt. 419. 2 Marsh. 124. S. C. and see 6 Taunt. 422. 2 Marsh. 125. (a).

¹³ 6 Taunt. 483. 2 Marsh. 185. S. C.

¹⁴ 5 Moore, 330.

¹⁵ 3 Bos. & Pul. 456.

¹⁶ 1 New Rep. C. P. 64. 2 New Rep. C. P. 429. *Ante*, 733. but see 2 Wils. 118. 2 Blac. Rep. 758. 3 Wils. 206. S. C.

that the demandant would be barred, unless the amendment were allowed.¹ And amendments are so little favoured in a writ of right, that after an amendment of the count had been made, under a judge's order, the court discharged the order for making it.² So, they would not allow him to quash a writ of *summons*, which had been irregularly executed.¹ And an amendment of the disseisor's name was refused, in a writ of entry *sur disseisin en le post.*³ But a declaration on a writ of *partition*, and the sheriff's return, were amended, by striking out an erroneous description of the *quality* of the estates conveyed to the different parties.⁴

[*756] *Fines and recoveries*, being considered as common assurances, the court of Common Pleas will amend them, when they have sufficient authority, so as to effectuate the intention of the parties. The ground upon which the court proceeds, in making these amendments, is the statute 8 Hen. VI. c. 12. which authorizes them to amend the misprision of the clerk; and as the *præcipe* is the cursitor's instruction for an original writ, so a deed to lead the uses is considered as his instruction for a fine or recovery.⁵ By the above statute, a mistake in the form,⁶ *teste*,⁷ or return⁸ of a writ of covenant for levying a fine, or writ of entry for suffering a recovery,⁹ may be amended by the court, where the mistake was occasioned by the misprision of the clerk, and there is something to amend by; but otherwise, it seems, it is not amendable.¹

Fines may in general be amended, by the deed to lead or declare the uses,¹⁰ in the names of the parties,¹¹ or in the description of the premises,¹² or of the place where they are situate;¹³ and, in a late case,¹⁴ the court permitted a fine to pass as to all the consors except one, whose acknowledgment had been taken incorrectly, and whose interest was so inconsiderable that the parties did not think it worth while to have another fine. So, the court allowed the warranty in a fine to be amended, by altering it from a warranty by the husband and wife, and the heirs of the *husband*, to a warranty by the husband and wife, and the heirs of the *wife*.¹⁵ But where there was no deed to declare the uses, they would not permit an alteration to be made in the christian¹⁶ or surnames¹⁷ of the parties: And if the name of a party be written on an erasure, this, being a suspicious circumstance, must be explained by affidavit, before the amendment

¹ 1 New. Rep. C. P. 233.

² 1 Bing. 208.

³ 1 Marsh. 602.

⁴ 4 Taunt. 572.

⁵ 6 Taunt. 193. 1 Marsh. 537. S. C.

⁶ Barnes, 22.

⁷ 4 Taunt. 644. 708.

⁸ 5 Rep. 44, 5.

⁹ Cas. Pr. C. P. 127.

¹⁰ 5 Taunt. 259. 8 Taunt. 197.

¹¹ 1 Salk. 52. Willes, 563. Barnes, 17. S. C. 2 Blac. Rep. 1013. 8 Taunt. 104, 5.

¹² 4 Taunt. 257. 6 Taunt. 73. 1 Marsh. 452. S. C.

¹³ 1 Marsh. 578. 6 Taunt. 586. 1 Moore, 125. 8 Taunt. 20. 1 Brod. & Bing. 151. but see 2 Bos. & Pul. 455.

¹⁴ Cas. Pr. C. P. 10. 4 Taunt. 257. 708.

¹⁵ 6 Taunt. 276. 7 Taunt. 79. 2 Marsh. 391.

¹⁶ S. C. 8 Taunt. 74. 335.

¹⁷ Cas. Pr. C. P. 10. 52. 121. Barnes,

216. S. C. *Id.* 24. 3 Wils. 58. 8 Taunt.

396. 6 Taunt. 73. 1 Marsh. 452. S. C. *Id.*

468. 6 Taunt. 162. 1 Marsh. 519. S. C. 7

Taunt. 79. 2 Marsh. 391. S. C. 8 Taunt.

87. *Id.* 692. 3 Moore, 22. S. C. 4 Moore,

170.

¹⁸ 5 Taunt. 249.

¹⁹ 3 Moore, 329. 1 Brod. & Bing. 68. S.

C. but see 8 Taunt. 87.

²⁰ 2 Blac. Rep. 816. 4 Taunt. 226.

²¹ 2 Bos. & Pul. 455.

can be made;* although the party had signed his right name at the foot of the deed.^f Where the deed was general, and the intent only proved by affidavit, the court would not allow the number of acres inserted in a fine to be *increased.^g So, where a fine was [*757] levied of *thirty* acres of land, *twelve* acres of meadow, and *twenty-five* acres of pasture, and in the deed to lead the uses, the estate was described as consisting of *thirty-five* acres in the whole, the court refused to amend the fine, by increasing the quantity of each species of land, so as to make each cover the whole quantity intended to be conveyed.^h So, where a fine comprised only lands lying in the parishes of S. and S., within a larger district, the deed so describing the lands, which were in truth within the parish of F. in the same district, the court refused to amend the fine, by inserting also the parish of F.ⁱ And where a mistake having been made in the *concord* of a fine, in the number of messuages to be conveyed, the writ of *covenant* was altered in conformity thereto, but was afterwards restored to its original form; the court would not amend the *concord* by the writ of *covenant* so altered, but left the party to his remedy by a new caption, or by re-acknowledging the concord.^k So, if there be two *præcipes* to a fine, and the premises be described in the one as manors tithes and tenements, and in the other as tenements only, the court will not allow the fine to pass.^l

The court in one case permitted the name of a parish to be inserted in a fine, according to the deed to lead the uses, although, on account of the length of time which had elapsed since the date of the deed, no one could swear that the parcels lying in that parish were intended to pass;^m and in another, the fine was amended, by inserting a parish different from that which was named in the deed to lead the uses, it being certain by the deed, which specified the quantities and occupiers, that the land was intended to pass.ⁿ And a fine may be amended, by substituting one county for another, if it appear that the lands intended to pass are situate in the same parish, which runs into both counties.^o But in general, an amendment cannot be made, by transposing parishes from one county to another.^p A fine may also be amended, where there has been a mistake in the entry of the king's silver,^q or of the proclamations;^r or a fine with double operation, by striking out lands in reversion.^s And the concord of a fine being lost, before it had passed the **custos brevium* [*758] office, the court permitted a new concord and acknowledgment to be prepared, and the fine to be perfected.^t So, a fine was allowed to pass, by a copy of the *præcipe* and concord left with the chief

* 3 Moore, 23. 8 Taunt. 693. S. C. 1 Brod. and Bing. 15.

^f 3 Moore, 241.

^g 2 Blac. Rep. 1202. and see 1 H. Blac. 73.

^h 6 Taunt. 58. 1 Marsh. 446. S. C. and see 3 Moore, 70. 6 Moore, 50. Post, 760.

ⁱ 6 Taunt. 284.

^j Id. 1. 1 Marsh. 406. S. C.

^k 3 Moore, 210.

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^l 2 Taunt. 1.

^m 5 Taunt. 207. 1 Marsh. 23. S. C. and see 5 Taunt. 303. 1 Marsh. 532.

ⁿ 8 Taunt. 87. 1 Moore, 530. S. C.

^o 4 Taunt. 708. and see 3 Taunt. 418. and the other cases referred to in 8 Taunt. 88. 1 Moore, 530. S. C. accord.

^p 5 Rep. 43.

^q Id. 44.

^r 5 Taunt. 631.

^s 4 Taunt. 195.

justice, and signed by the parties, the original having been lost.^a But although the court will amend a fine in matters of *form*, yet when it is recorded of one term, they will not alter it, and make it a fine of another.^x And in general, a fine cannot be amended, without an affidavit connecting it with the deed produced to warrant the amendment.^y And the affidavit must state, that the possession has been in conformity to, and followed the deed to lead or declare the uses, since the fine was levied.^z

Recoveries in like manner may be amended, by the deed to lead the uses, in striking out,^a altering,^b adding to,^c or transposing^d the names of the parties: and where a recovery was intended to be suffered by A. B. and C. his wife, but the name of the wife was totally omitted, the court ordered it to be amended.^e So, a recovery may be amended *in fieri*, by substituting a new commissioner for the demandant in the *dedimus potestatem*, and retaking the acknowledgment.^f But the court would not amend a recovery, by inserting the name of the husband of a vouchee;^g nor by substituting the name of one joint-tenant to the *præcipe*, for that of his companion.^h And a recovery cannot be amended, by inserting an additional christian name of the vouchee, if he has always been known, and signed the deed to make a tenant to the *præcipe*, without such name.ⁱ A warrant of attorney in a recovery was amended in ope case, by inserting an additional christian name of the vouchee;^k and in another, by substituting the name of the attorney for that of the vouchee, which had been inserted by mistake instead of the attorney's:^l But it is now settled, that the court will not amend a warrant of attorney, which is the act of the party:^m and therefore they refused to amend a recovery, by adding the name of one of the parties, which had been omitted in the warrant of attorney; nor would they suffer the recovery to pass with this defect.ⁿ The *præcipe* for the writ of entry, however, at the head of the warrant of [*759] attorney, is not so conclusively a part of it, ^obut that it may be amended, after execution, by the writ of entry:^p And where the vouchee's warrant of attorney in a recovery omitted to express, in the body of the warrant, against whom the plea of land was, which appeared by the *præcipe*, the court, though they would not amend the warrant of attorney, held that the authority must refer to the plea as described by the *præcipe*, and permitted the

^a 6 Taunt. 231. 1 Marsh. 553. S. C.

^x 2 Blac. Rep. 788. and see Vin. Abr. tit. *Fine*, B. b. 2. Wilson on Fines, 53.

^y 6 Taunt. 432.

^z 6 Moore, 259.

^a 3 Taunt. 59. 5 Taunt. 73. 7 Taunt. 697.

^b Cas. Pr. C. P. 127. Piggot, 170, 71.

^c 2 Blac. Rep. 1230. 8 Taunt. 226. 556. 4 Moore, 514. 2 Brod. and Bing. 98. S. C.

^d 8 Taunt. 27. but see 3 Moore, 577.

^e Barnes, 24. 2 Taunt. 222. 4 Moore, 514. 2 Brod. and Bing. 98. S. C. But the court will not allow a recovery to be amended, by transposing the names of the demandant and tenant, unless the documents relative to its being suffered

be produced. 6 Moore, 46.

^f Cas. Pr. C. P. 127.

^g 5 Taunt. 747.

^h 1 Taunt. 478.

ⁱ 4 Taunt. 101. and see 3 Moore, 577.

^k 8 Taunt. 645. 2 Moore, 721. S. C.

^l 4 Taunt. 196.

^m *Id.* 98. and see 1 Bing. 343.

ⁿ 6 Taunt. 373.

^o *Id.* 652. 2 Marsh. 328. S. C.

^p 7 Taunt. 434. 1 Moore, 130. S. C. In the printed reports of this case, the *præcipe* for the writ of entry is inappropriately called the *caption* of the warrant of attorney. 3 Moore, 499. n. 1 Brod. and Bing. 96. S. C. and see 1 Bing. 22. 72.

recovery to pass.^p So, a recovery was permitted to pass, where the warrant of attorney did not state between whom the plea of land was; it being evident from the *præcipe*, for what purpose the attornies were appointed;^q and also, where the warrant of attorney was "in a plea of land," omitting the words "to gain or lose."^r And if a wrong surname of the demandant be inserted by mistake in the warrant of attorney and subsequent instruments, the court will allow the recovery to pass, on the production of a new warrant of attorney rectifying such mistake, and on depositing the other instruments with the officer in the mean time.^s But where the *præcipe*, in the vouchee's warrant of attorney in a recovery, rightly described the parties to the plea, but the body of the warrant of attorney expressed that the vouchee appointed his attorney, to gain or lose in a plea of land against the *tenant*, instead of the *demandant*, the court refused either to amend the warrant of attorney, or to suffer the recovery to pass, and construe the latter clause as repugnant and inoperative.^t So, they would not direct their officer to pass a recovery, where there was a mistake in the form of the entry, to which the warrant of attorney related, by making it a *demand* instead of a *præcipe*;^u nor would they permit the same mistake to be rectified, by amending the warrant of attorney.^v

So, a recovery may be amended, by the deed to lead the uses, in the description of the premises, or of the place where they are situated.^w In the former case it may be amended, by inserting other premises not mentioned therein, according to the deed to lead the uses, on payment of an additional fine at the alienation office;^x and it has been amended, by increasing the quantities of specific [*760] closes, described in the deed as being less than they really were.^y But no amendment can be made in the description of the premises, where it is not warranted by the deed to lead the uses;^z nor unless the true number of messuages, &c. be distinctly and precisely sworn to;^a nor without proof of seisin of the vouchee of an estate tail therein, at the time of the recovery, and that it was intended they should pass.^d And the court would not permit a recovery to be amended, by increasing the quantity of land, where the deed to lead the uses contained sufficient terms to show that it was intended to pass; nor was it deemed necessary, that the exact admeasurement should be inserted in such deed.^g So, a recovery was not permitted

^p 6 Taunt. 373. and see 7 Taunt. 435.

(a).

^q 8 Taunt. 164.

^r *Id. ibid.*

^s 3 Moore, 673.

^t 1 Brod. and Bng. 92. 3 Moore, 495.

S. C.

^u 8 Taunt. 167.

^v *Id.* 168.

^w Caa. Pr. C. P. 9, 10, 17, 30. Com. Rep.

386. S. C. Cas. Pr. C. P. 85. Pr. Reg. 371.

S. C. Piggot, 171, 2. Barnes, 21. 2 Blac.

Rep. 747. 3 Wils. 154. S. C. 2 Blac. Rep.

1065. 1 H. Blac. 73. 2 Bos. and Pul.

560. 578. 4 Taunt. 249. 738. 749. 5

Taunt. 624. 661. 6 Taunt. 177. 1 Marsh. 532. S. C. 8 Taunt. 86. 1 Bing. 317.

^x 1 Bos. and Pul. 137. 2 Bos. and Pul.

578. 580. (a). 1 Taunt. 257. 355. 484. 3

Taunt. 74. 408. 462. 4 Taunt. 155. 226.

366. 734. 737. 8. 5 Taunt. 748. 811. 8

Taunt. 303. 2 Moore, 299. S. C. but see

5 Taunt. 616. 6 Taunt. 145.

^y 4 Taunt. 734. 8 Taunt. 74. 2 Moore,

163. but see 5 Taunt. 616.

^z 3 Bos. & Pul. 362.

^a 5 Taunt. 632.

^d *Id.* 811. and see 3 Moore, 70. 1 Brod.

& Bing. 69.

^g 6 Moore, 50. and see 1 Bing. 94.

to be amended, on an unqualified affidavit that the possession had gone along with the title, for a period long before the deponent's knowledge, without stating the grounds of his belief.^f And where a recovery of *fifty* years old was found by mistake to comprise only *two* messuages and *twenty* acres of land, instead of *six* messuages and *three hundred* acres of land, the blunder being wholly unexplained and unaccounted for, the court refused to permit an amendment, by substituting the larger quantity.^g If *marsh* land be described as land generally, in a recovery, it may be amended, by inserting the word "marsh" before "land," on an affidavit stating how the premises had been occupied since the recovery was suffered.^h So, a recovery of land may be amended, by inserting "*meadow* and *pasture*."ⁱ But if *wood* land be converted into *arable*, the court will not allow an amendment, by increasing the quantity of the latter; as the land would pass under either description.^k A recovery may be amended, by inserting a rent charge,^l fee farm rent,^m or tithes,ⁿ where it appears that they were intended to pass, and the words of the deed are sufficiently comprehensive to include them; or by substituting the words "advowson of the church," for the word "rectory;"^o or the words "perpetual advowsons," for those of "tithes to rectories belonging and appertaining;"^p or by describing tithes, as arising out of a borough and parish, instead of a rectory.^q But an amendment was refused, by striking out the aggregate sum of [*761] several rents, and inserting the different rents or *sums of which it was composed.^r And the court will not amend a recovery, by adding the *tithes* of the premises, under the word *hereditaments*, where that word does not occur in the operative part of the deed;^s nor, by striking out a "*portion* of tithes," and substituting "*all* the tithes" arising from the lands conveyed.^t

With regard to the situation of the premises, recoveries have been amended, by substituting a hamlet for a parish,^u or part of a parish which lay within a liberty, for other part of the parish which lay within a borough, in the same county;^x and by inserting a parish named in the deed to lead the uses, after a considerable lapse of time.^y So, a recovery of the manor of A. and eight messuages in A. was amended, by adding the names of the parishes in which the premises were partly situated; those parishes being comprised in the manor of A.^z So, where lands in two parishes were conveyed as lying in the parish of G. which was not the true name of either, nor of any parish, but was an addition equally applicable to both, the court permitted both parishes to be added to an old recovery.^a And

^f 7 Taunt. 697.

^g 1 Brod. & Bing. 83.

^h 5 Moore, 98.

ⁱ 1 Bing. 22.

^k *Id.* 94.

^l 1 Taunt. 484.

^m 5 Moore, 474.

ⁿ 2 Marsh. 264. 7 Taunt. 341. 352. 1 Moore, 95. S. C. 8 Taunt. 303. 2 Moore, 299. S. C. 5 Moore, 94, 5. 6 Moore, 224.

^o 8 Taunt. 333. 6 Moore, 53.

^p 4 Moore, 49.

^q *Id.* 170.

^r 2 Marsh. 264.

^s *Id.* 194. and see 4 Moore, 604. 2 Brod. & Bing. 105. S. C.

^t 6 Taunt. 489. 2 Marsh. 195. S. C. but see 2 Marsh. 264.

^u 1 Moore, 131.

^x 3 Taunt. 396.

^y 5 Taunt. 2. and see 3 Taunt. 408. 8 Taunt. 191. 262. 3 Moore, 326.

^z 2 Marsh. 330.

^a 4 Taunt. 737. 5 Taunt. 624.

where a deed to make a tenant to the *præcipe* comprised tithes in two parishes, and an amendment had been improperly introduced into the recovery, which confined its operation to one parish only, the court allowed the words of such amendment to be transposed, so as to give effect to the deed, and comprise both parishes.^b So, a recovery may be amended, by substituting the parish of A. for B., if the deed to lead the uses comprehend all the estates of the demandant, situate in the county where such parishes lie.^c So, a recovery has been amended, by altering the name of a parish misnamed in the deed making the tenant to the *præcipe*, as well as in the recovery, upon an affidavit that the vouchee was seised of the land in question in one parish, and that he was seised of no land whatever in the other.^d And the recovery was amended in a modern case, by inserting the county of the town of S. for the county of S. the court considering it merely as a clerical misprison.^e But where the situation of the premises is mistaken in the deed to lead the uses, it cannot be amended by the court.^f And they would not *permit [*762] a recovery to be amended, by inserting a parish not named in the deed to make a tenant to the *præcipe*, although it appeared that the parish was named in the instructions given for preparing that deed, and that the lands were parcel of an estate which was intended to pass; for by the omission in the deed, there could be no good tenant to the *præcipe*.^g So, the court refused to amend a recovery, by adding two parishes in unqualified terms, where the deed enumerated several manors, and a great extent of lands in many parishes, and the purpose of the amendment was only to include certain parcels of one manor, which lay in the omitted parishes.^h And they will not amend a recovery, by inserting more parishes, unless it be clear that the land in those parishes passed by the deed;ⁱ nor unless it appear to be absolutely necessary.^k So, where a recovery was suffered in the city of *Litchfield*, which is a county of itself, where the vouchee had lands upon which it might operate, the court would not suffer it to be amended, by striking out the city of *Litchfield*, and inserting the county of *Stafford*, with other consequential amendments, and also by inserting the name of a vill, after another mentioned in the recovery:^l nor can a recovery be amended, so as to make it of premises in one of two counties, in the alternative;^m nor by changing it from one county to another.ⁿ So, where a vouchee had, in his instructions to suffer a recovery, and in the deed to lead the uses prepared in pursuance thereof, mis-described the parish in which certain closes were situate, though they were described in the deed with truth and certainty in other respects, the court refused to substitute the parish in which the lands lay, for the parish named in the deed and recovery.^o A remainder-man

^b 7 Taunt. 352. 1 Moore, 95. S. C.

^c 2 Moore, 237.

^d 5 Taunt. 303. and see 8 Taunt. 244. but see *id.* 262.

^e 4 Taunt. 855. and see 6 Moore, 259. *Id.* (a).

^f 6 Taunt. 145.

^g 2 Taunt. 96.

^h 7 Taunt. 177.

ⁱ 4 Taunt. 738.

^j 8 Taunt. 683. 3 Moore, 20. S. C.

^k 2 Blac. Rep. 874.

^l 1 Taunt. 538.

^m 3 Taunt. 418. and see 4 Taunt. 708.

but see 8 Taunt. 87. 1 Moore, 530. S. C.

ⁿ 6 Taunt. 145.

in tail may be heard to shew cause against the amendment of a recovery.^p And where the deed is lost, a recovery cannot be amended by an attested copy; nor by an office copy of the enrolment of the deed. But it may be amended by the enrolment itself being brought into court.^q And, on applying to amend a recovery, it is not necessary to shew a title to the court, further back than a seisin in tail of the vouchee.^r

The return of the writ of entry may be amended, by adapting it to the time of taking the acknowledgment.^s But the court will [*763] not enlarge the return of a writ of summons, so as to make a term intervene between the *teste* and return.^t And the court refused to make an order, compelling the amendment of a recovery suffered by an insolvent debtor.^u The judgment on a common recovery has been amended, by striking out the word *adjudged*, and inserting instead thereof, the word *considered*.^v and amendments have been made in the award and return of the writ of seisin.^w But, by the statute 23 *Eliz.* c. 3. § 10. "none of the fines or recoveries theretofore levied, passed or suffered, which shall be exemplified under the great seal, according to the form of that act, shall after such exemplification had, be in any wise amended." The court, we have seen,^x will not entertain a motion on the last day of term, for the amendment of fines or recoveries, or any of the proceedings therein,^a or on any subject relating thereto.^b And when a fine or recovery is moved to be amended, the court will always require an affidavit to be made, that the possession has been in conformity to and followed the deed to lead or declare the uses, since such fine or recovery was levied or suffered.^c It is also a rule, that the material part of the deed, which is to authorize the amendment, shall be read to the court by one of the serjeants at law, or by the officer of the court, and not by the attorney for the amendment.^d If there be palpable mistakes in a fine or recovery, through the neglect of the attorney, the court will order him to pay the costs of its amendment.^e

Before plea, there are no costs payable upon amending the declaration, in ordinary cases, except the costs of the application; and, in the King's Bench, the declaration may be amended in matter of *form*, after the general issue pleaded, and before entry, without paying costs, or giving an imparlance.^f But if the amendment be in matter of *substance*, or after the general issue is entered,^g or a special plea pleaded,^h the plaintiff must pay costs or give an impar-

^p 7 Taunt. 352.

^q 4 Taunt. 798.

^r *Id.* 155.

^s 5 Taunt. 259; and see 8 Taunt. 197.

^t 2 Blac. Rep. 1201. 1223, 4. and see 8 Taunt. 104, 5.

^u 8 Taunt. 105.

^v Barnes, 20. 22.

^w Cas. Pr. C. P. 127. Barnes, 23. 2 Wils.

^x 6 Taunt. 195. 1 Marsh. 538. S. C.

^a *Ante*, 504.

^b R. H. 60 Geo. III. & 1 Geo. IV. C. P.

^c 4 Moore, 320. 2 Brod. & Bing. 122.

^d 4 Moore, 113. 1 Brod. & Bing. 468. S. C.

^e 6 Moore, 259.

^f 5 Taunt. 579.

^g 4 Moore, 171.

^h R. M. 10 Geo. II. reg. 2. (b). K. B. And for the form of the rule to amend, in K. B. or C. P. see Append. Chap. XXX. § 7, 8.

ⁱ R. M. 10 Geo. II. reg. 2. (b). K. B. Sty. P. R. 20. 2 Str. 950. 1 Lil. Pr. Reg. 59.

^j 2 Str. 890. Lofft, 155.

lance, at the election of the *defendant*.¹ And where the plaintiff gave notice of trial for the assizes, and afterwards countermanded, and then applied for an order to amend the declaration, which order was obtained on the terms of the defendants having an imparlance till the next term, the court of King's Bench refused to rescind so much *of the order as related to the imparlance.² In the Common [*764] Pleas, it is a rule, that before the declaration is actually entered, the plaintiff may amend it, paying costs or giving an imparlance at his own election, by order of a judge of the court, or prothonotary: and even after it is entered, if the amendment be but a small matter, that doth not deface the roll, it is amendable, before issue or demurrer entered, by rule of court, upon payment of costs, and liberty to plead with a new or further imparlance.³ But where the defendant had demurred, and given a rule to join in demurrer, the court held that the plaintiff must pay costs, on amending his declaration, and could not amend on giving an imparlance.⁴ And where a motion was made to amend a declaration, after the plea-roll filed, it was objected that the motion ought to be to amend the roll, and not the declaration: and the amendments prayed being very long, and such as could not be made without greatly defacing the roll, the motion was denied; although it was contended that a *vacatur* might be marked on the roll filed, or it might be taken off the file, and a new roll of the same number filed in its place, which the court held to be an unwarrantable practice.⁵ When amendments are made at the trial, they are made without costs.⁶ On amending the declaration in the King's Bench, after plea pleaded, the defendant is at liberty to plead *de novo*, if his case require it, and has *two* days allowed him for that purpose, after the amendment made, and payment of costs;⁷ and if a rule to plead be entered the same term the amendment is made, though before such amendment, it is sufficient; otherwise a new rule to plead must be entered.⁸ But in the Common Pleas, we have seen, the defendant is entitled in all cases, on amending the declaration, to a new *four* day rule to plead.⁹ And in that court, after an amendment of a declaration, the defendant is at liberty to plead *de novo*, that is, he may do so if he has occasion, or thinks proper, but he is not obliged to vary his first defence.¹⁰ And as this liberty is not incident to every amendment, it is not always necessary to insert it in the judge's order to amend.¹¹ If *the declaration, however, be amended after issue delivered, [*765]

¹ *Sed quare*: as it seems, from R. M. 1654. § 13. K. B. & § 17. C. P. that the election to pay costs, or give an imparlance, is with the *plaintiff*: and see 2 Keb. 120. 362. 1 Lil. P. R. 58. 60. 62. *accord*.

² 1 Chit. Rep. 246. *Ante*, 481.

³ R. M. 1654. § 17. C. P. but see 2 Str. 950. *semb. contra*.

⁴ Barnes, 6.

⁵ *Id.* 8. and see 2 Chit. Rep. 34. *Id.* 302.

⁶ 1 Dowl. & Ry. 173. S. C.

⁷ 3 Taunt. 81.

⁸ R. M. 10 Geo. II. reg. 2. (b). K. B.

Anciently, it seems, the defendant did not plead *de novo*, after an amendment: 2 Salk. 517. but he is now at liberty to do so, when the amendment is of such a nature as to occasion any alteration in the plea, but not otherwise.

⁹ 2 Salk. 517, 18. 520. R. T. 5 & 6 Geo. II. (b). K. B. *Yates v. Edmonds*, T. 35 Geo. III. K. B. 8 Durnf. & East, 87. 2 Chit. Rep. 332.

¹⁰ 2 Blac. Rep. 785. *Ante*, 481, 2. *481. a.

¹¹ Barnes, 273.

¹² 6 Taunt. 400.

it should be re-delivered after the amendment made, and payment of costs.^a

The reason for not permitting a new count to be added, or right of action alleged, after the end of the second term, is that the plaintiff is obliged to declare within two terms; and a new count or right of action is considered as a new declaration.² But this reason is not applicable to pleas or replications, &c. which may be amended at any time, so long as they are in paper: Thus, where the defendant in *trespass* pleaded two pleas in *Hilary* term, and in *Trinity* term, after issue joined, obtained a rule to show cause why he should not have leave to amend his two pleas, and to add a third plea, the rule was made absolute, upon payment of costs.⁷ So where, in a plea by an executor of a former judgment recovered, a less sum was stated by mistake than the judgment was really for, the court of Common Pleas permitted the defendant to amend the record, by inserting the real sum in the plea, though the application for such amendment was not made till a considerable time after the record had been made up: and the plaintiff in such case was allowed to reply *per fraudem*.² And where, in *covenant*, the defendant was not allowed to give a counter-demand in evidence at the trial, under a notice of set off delivered with the plea of *non est factum*, the court afterwards granted a rule to shew cause, why the defendant should not be permitted to plead a set off, on payment of the costs of the former trial.⁴ In like manner, the plaintiff has been allowed to amend, by withdrawing his replication, and replying *de novo*, after a lapse of many terms.^b And in one case, the plaintiff had leave to amend his replication, where issue had been joined upon it, and the cause entered at the assizes, and made a *remanet* for defect of jurors.⁹ But where, to a plea of specialties outstanding, in an action on simple contract against an executrix, the plaintiffs replied *assets ultra*, which was found for them, but the verdict set aside, the court of King's Bench refused to give them leave to alter their replication, and reply *fraud*,^d for besides that there had been a trial, it might have been dangerous to permit the alteration; because the defendant, on the former issue, might have paid away *assets*, as knowing the replication could not affect her. So, where the plaintiff had been nonsuited, upon a general replication, "that the [*766] cause of action arose within six years," the court refused to set aside the nonsuit, and to give the plaintiff leave to reply *de novo*, "that the writ of *latitat* issued within the six years."^e

After a *demurrer*, the courts would not formerly have permitted an amendment to be made, without the consent of the adverse party.^f But of late years, they have not observed the same strictness as

^a 6 Taunt. 400.

² 1 Wils. 223.

⁷ *Id. ibid.* and see Barnes, 22.

⁴ 1 H. Blac. 238.

⁹ 1 Stark. *Ni. Pri.* 312, 13. and see 2 Chit. Rep. 28. 5 Barn. & Ald. 896. but see

3 Moore, 164. 2 Brod. & Bing. 395. S. C.

^b Say. Rep. 172. 2 Bur. 756. and see

1 Dowl. & Ry. 473.

^c Say. Rep. 285.

^d 2 Str. 1002. and see 6 Taunt. 45. 1

Marsh. 401. S. C.

^e 5 Bur. 2692, 3.

^f 1 Ld. Raym. 310. *Id.* 668. 1 Salk. 50.

S. C. 1 Ld. Raym. 679. S. P. but see Cas.

temp. Hardw. 171.

formerly, with regard to amendments;^f and it is much better for the parties that they should not. Hence it is now settled, that after a demurrer, or joinder in demurrer, either party is at liberty to amend, as a matter of course, whilst the proceedings are in paper:^h Indeed, the very intent of requiring mistakes in point of form to be shewn for cause of demurrer, was to give the party an opportunity of amending.ⁱ And even where the proceedings are entered on record,^k and the demurrer has been argued,^l the courts will give leave to amend, where the justice of the case requires it, and there is any thing to amend by, upon payment of costs.^m But, in the Common Pleas, after a party has once amended on a demurrer, the court will not give him leave to amend again, on a second demurrer.ⁿ

Upon similar grounds, the courts will sometimes give a party leave to *withdraw* his demurrer, after it has been argued, and to plead or reply *de novo*, in order to let in a trial of the merits.^o Thus, in the King's Bench, after a demurrer to the defendant's plea had been argued, and the matter stood over for the judgment of the court, a rule was made to shew cause; why the plaintiff should not have leave to withdraw his demurrer, and reply to the plea; which rule, no cause being shewn, was afterwards made absolute.^p So, in the Common Pleas, where the defendant pleaded, in *debt* on bond, that he paid the money *before* the day, according to the condition, which was in the disjunctive, to pay *on* or *before* the day, and the plaintiff demurred to the plea, the court, after argument, allowed him to withdraw his demurrer, and to reply, upon payment of costs.^q The courts however will always take care, that if one party obtain [*767] leave to amend, or to withdraw his demurrer, the other party shall not be delayed or prejudiced thereby.^r

But the giving or withholding leave to withdraw demurrers, is altogether discretionary in the courts.^s Therefore where, to an action of *debt* upon a bail bond, the defendant pleaded there was no bill of *Middlesex*, and the plaintiff demurred, the court of King's Bench, after delivering their opinion in favour of the defendant, refused to give the plaintiff leave to withdraw his demurrer, and amend:^t And by *Wright*, Just. "It is not usual to amend, after a demurrer has been argued, and the opinion of the court is known: And it is certainly improper to give leave in the present case, it being an action against bail, whom the court are always inclined to favour." So, where the defendant rejoined to several replications in *trespass*, and

^f 2 Bur. 756.

^h 2 Salk. 520. Gilb. C. P. 114, 15.

ⁱ 2 Str. 846.

^k *Id. ibid.* 1 Barnard. K. B. 213. 220. S. C. Barnes, 8.

^l 2 Saund. 402. 2 Str. 735. 954. 976. *Chas. temp. Hardw.* 42. S. C. 1 Bur. 321, 2. Doug. 330. 620. 1 East, 372. Barnes, 9. 20, 21. 25. But after the court had given their opinion on the argument, an amendment was denied. 1 East, 391. and see Barnes, 9. 1 H. Blac. 37. 2 Bos. and Pul. 482. 3 Bos. & Pul. 11, 12. 5 Taunt. 765. 6 Taunt. 248. 1 Marsh. 567. S. C.

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^m 2 Chit. Rep. 292.

ⁿ 2 H. Blac. 561. but see 8 Taunt. 515, 16. 2 Moore, 566. S. C.

^o Doug. 385. 452.

^p 1 Kenyon, 335. Say. Rep. 316. S. C. and see 2 Chit. Rep. 5.

^q 2 Wils. 173. and see 1 Moore, 61.

^r 2 Bur. 756. but see 1 East, 372. where the plaintiff had leave to amend a replication to a *sham* plea, after argument, without paying costs.

^s 1 East, 135. (a). 5 Price, 412.

^t Say. Rep. 116, 17.

demurred to others, and a verdict was found for him upon the issues in fact, and contingent damages assessed upon the demurrers, which were afterwards overruled; the court of King's Bench refused to let the defendant withdraw his demurrers, and plead to issue:^a And, by *Denison*, Just. "Where the demurrer is first argued, before any trial of the issues, the court will give leave to amend; as in the case of *Giddins v. Giddins*:^b But this is an attempt to amend issues in law, after a verdict has been found on the issues in fact, and contingent damages assessed; of which there never was an instance. And we do not know where it would end; nor how the cause could be again carried down to trial. The court cannot help seeing that this is upon record: Here are verdicts and contingent damages found. The cases of amendment cited are, when the whole is supposed to be in paper; or else the court could not have done it. We have no authority to do this, after it is plainly upon record." So, where judgment has been given for the defendant on demurrer to a plea, the court of Common Pleas will not, in a subsequent term, set aside that judgment, and suffer the plaintiff to reply, by confessing the matters contained in the plea, and taking judgment of *assets quando acciderint*.^c

Whilst the proceedings are *in paper*, the amendment is at common law; and not within any of the statutes of amendments, which relate only to proceedings of record.^d And there is no difference, as to the doctrine of amending at common law, between *civil* and [*768] *criminal* cases:^e nor between *penal* and other actions.^f Thus, in a *qui tam* action for usury, the plaintiff was permitted to amend his declaration, by altering the date of a note, after issue joined and entered on the roll, and after many terms had elapsed since the commencement of the action.^g A similar amendment was permitted, in a subsequent case, after the record had been made up for trial, and withdrawn upon discovery of the mistake.^h So, where the defendant was served with the copy of a *latitat* in a penal action, by a wrong name, and declaration filed conditionally by the same name, to which he appeared, and pleaded a misnomer in abatement, the court of King's Bench held, that a judge's order to amend the bill and declaration, by substituting the true name, was good; and that after such amendment, the proceedings could not be set aside for irregularity.ⁱ And in general it seems, that where there has been no unnecessary delay on the part of the plaintiff, the courts will give him leave to amend his declaration in a penal action, even after the time allowed for bringing a new one is expired.^j But where the plaintiff in such an action has been guilty of any unnecessary delay in prosecuting his suit, the courts in their discretion will not

^a 1 Bur. 321, 2.

^b Say. Rep. 316.

^c 6 Taunt. 45. 1 Marsh. 401. S. C.

^d 1 Salk. 47. 3 Salk. 31.

^e 1 Salk. 51. 2 Ld. Raym. 1068. 6 Mod.

285. S. C. Cas. temp. Hardw. 42. 2 Str.

739. 4 East, 175.

^f 1 Str. 137. 2 Str. 1227. 1 Wils. 256.

1 Bur. 402. 3 Maule & Sel. 450.

^g 2 Bur. 1098, 9.

^h 5 Bur. 2833, 4. and see *Thilleur, qui tam*, v. *Cocks*, T. 22 Geo. III. K. B. 6 Durnf. & East, 173.

ⁱ 3 Maule & Sel. 450.

^j 6 Durnf. & East, 543. 7 Durnf. & East,

55. 4 East, 433. 435. and see 2 Chit. Rep.

23. 25.

permit amendments to be made in the declaration, though the pleadings are still in paper:⁵ And in a late case, the court of Common Pleas would not, in a penal action, alter the term of which the declaration was entitled, to a previous term, without a sufficient reason being assigned by affidavit.⁶ So, in an action of *debt*, to recover penalties against a sheriff's officer for extortion, on the statute 32 Geo. II. c. 28, that court, we have seen,¹ would not allow the declaration to be amended, by adding new counts on the statute 23 Hen. VI. c. 9. And there is said to be no instance, in which the court of King's Bench have given leave to amend, as to the parties to the suit in a *qui tam* action, after demurrer:²

When the proceedings are entered on *record*, the courts, it is said, will amend no farther than is allowable by the statutes of amendments.¹ By the first of these statutes, (14 *Edw.* III. stat. 1. c. 6.) it is enacted, that "no process shall be annulled or discontinued, by misprision of the clerk, in writing one syllable or letter too [*769] much or too little; but as soon as the mistake is perceived, by challenge of the party, or in other manner, it shall be amended in due form, without giving advantage to the party that challengeth the same, because of such misprision." The judges construed this statute so favourably for suitors, that they extended it to a *word*.² And, by the 9 *Hen.* V. stat. 1. c. 4. it is declared, that they shall have the same power, as well *after* as *before* judgment, so long as the record and process are before them. This statute is confirmed, and made perpetual by 4 *Hen.* VI. c. 3. with a proviso, that it shall not extend to process of outlawry, &c. By the 8 *Hen.* VI. c. 12. the justices are further empowered to examine and amend what they shall think, in their discretion, to be the misprision of their clerks, in any record, process, word, plea, warrant of attorney, writ, panel, or return: And, by the 8 *Hen.* VI. c. 15. they may amend the misprisions of their clerks and other officers, as sheriffs, coroners, &c. in any record, process, or return before them, by error or otherwise, in writing a letter or syllable too much or too little. These are, properly speaking, the only statutes of *amendments*:³ and it seems they apply to *penal* as well as to other actions;⁴ but they do not extend to *criminal cases*,⁵ nor, as it should seem, to process in *inferior courts*.⁶

⁵ 2 *Durnf. & East*, 707. 6 *Durnf. & East*, 171. 8 *Durnf. & East*, 30.

⁶ 6 *Taunt.* 19. 1 *Marsh.* 419. S. C. but see 2 *Chit. Rep.* 22. 25.

¹ *Ante*, 753.

² *Per Buller*, J. 4 *Durnf. & East*, 228.

³ 1 *Salk.* 47. 3 *Salk.* 31. *Gilb. C. P.* 114, 15. 2 *Wils.* 147. 2 *Blac. Rep.* 920.

⁴ 8 *Co.* 157. a.

⁵ 1 *Salk.* 51. The rest, beginning with the 32 *Hen.* VIII. c. 30. are statutes of *joinders*.

⁶ 1 *Bol. Abr.* tit. *Amendment*. 2 *Str.* 1237. *Doug.* 114. 1 *Marsh.* 180. 2 *Chit. Rep.* 25. 1 *Stark. N. Pri.* 400. S. C.

⁷ 1 *Salk.* 51. 2 *Ld. Raym.* 1307. *Gilb. C. P.* 116.

⁸ *Willes*, 122. The language however, used by the court in this case, "that the words of the statutes of amendments do not extend to inferior courts," must, it is presumed by Mr. *Durnford*, be understood with this qualification, that the inferior court itself cannot amend: For, if a writ of error be brought in the King's Bench from an inferior court, for an error amendable by the statute 8 *Hen.* VI. c. 12. there seems to be no reason why the superior court should not amend that error; the words of that statute not being, that "in any action brought in any of the superior courts," but "for error assigned in any records, &c." no judgment shall be reversed, &c. but the king's

In order to amend upon these statutes, it is a general rule, that there must be something to amend by. And in compliance with this rule, it has been determined, that the original writ,^r or bill,^s is amendable by the instructions given to the officer; the declaration by the bill;^t the pleadings, subsequent to the declaration, by the paper-book,^u or draft under counsel's hand;^x the *nisi prius* roll by [*770] the plea roll;^y the verdict, whether general or special, by the plea roll,^z memory,^a or notes^b of the judge, or notes of the associate,^c or clerk of assize;^d and if special, by the notes of counsel,^e or even by an affidavit of what was proved upon the trial;^f the judgment by the verdict;^g and the writ of execution by the judgment,^h or by the award of it on the roll,ⁱ or by former process.^k But notwithstanding the general rule, which prohibits amendments not authorized by the above statutes, after the proceedings are entered on record, the courts, we have seen,^l have in particular instances permitted the plaintiff to amend his declaration or replication, and the defendant to amend his plea, in cases where there has been nothing to amend by, after issue joined, and after the proceedings have been entered on record, and even after a trial has been had thereon, and the plaintiff has been nonsuited, or failed in producing the record.

The amendment may be made in any stage of the proceedings:^m and those things which are amendable *before* error brought, are amendable *afterwards*, so long as diminution may be alleged, and a *certiorari* awarded.ⁿ After error brought in the King's Bench, on a judgment of the Common Pleas, the amendment may be made

judges, &c. may amend, &c. *Id.* 126. *n.* but see 1 Rol. Abr. 209, 10. *semb. contra.*

^r 8 Co. 161. 1 Ld. Raym. 564. 1 Salk. 49. S. C. Barnes, 10. 16. 22.

^s Barnes, 3. 11. 16. 24. 26.

^t 1 Str. 583. 2 Str. 954. 1151. 1162. 1271. 1 Kenyon, 368. Sav. Rep. 294. S. C.

^u 8 Co. 161. b. Palm. 404. 5. Latch, 58.

^x 86. S. C. Cro. Car. 144. 1 Salk. 53. 88. 2 Ld. Raym. 895. S. C.

^y Cro. Eliz. 258. 2 Str. 846. 1 Barnard.

^z K. B. 213. 220. S. C.

^a 8 Co. 161. b. Cro. Car. 203. 1 Salk. 48. 1 Ld. Raym. 94. 12 Mod. 107. Comb. 393.

^b S. C. 2 Str. 1264. Sav. Rep. 76. Barnes, 14. 1 Camph. 57. 2 Chit. Rep. 22. but see 1 Ld. Raym. 511.

^c 1 Ld. Raym. 133.

^d Cro. Car. 338. Gilb. C. P. 164. 1 Bac. Abr. 101. Bul. *Ni. Pri.* 320. Cas. Pr. C. P. 118, 19. Barnes, 6. S. C. *Id.* 449.

^e 2 Str. 1197. 1 Wils. 33. S. C. Doug. 376. 673. 722. 745. 3 Durnf. & East, 639.

^f 749. 8 East, 357. 1 Bos. & Pul. 329. 3 Bos. & Pul. 343. 1 Marsh. 182. but see 1 H. Blac. 78. 6 Durnf. & East, 694. 1 Barn.

^g & Ald. 161. 2 Chit. Rep. 332. But the court of King's Bench rejected an application to amend the entry of a verdict, according to the notes of an arbitrator, to whom the cause had been referred, on the ground that they had no power to

compel such notes to be brought before them. 1 Chit. Rep. 283. And the application to amend the verdict by the judge's notes, should be made to the judge who tried the cause, and not to the court. *Id. ibid.*

^h 2 Chit. Rep. 352.

ⁱ Cro. Car. 144. 1 Salk. 47, 8. 1 Jld. Raym. 138. S. C. 1 Salk. 53. 1 Ld. Raym.

^j 335. 1 Barnard. K. B. 191. 1 Bac. Abr. 101. Gilb. C. P. 163. but see 2 Durnf. & East, 281.

^k 1 Rol. Rep. 82. 1 Rol. Abr. 207. pl. 15. 1 Salk. 47, 8. 53.

^l 1 Str. 514. 8 Mod. 49. S. C.

^m 2 Str. 787. 3 Durnf. & East, 349. 1 Marsh. 182.

ⁿ Barnes, 10, 11. 2 Blac. Rep. 836. 2 Durnf. & East, 737. 5 Durnf. & East, 577.

^o 6 Durnf. & East, 450. 4 Taunt. 322.

^p 1 Say. Rep. 12. 3 Wils. 58. 2 Bos. and Pul. 336. 1 Marsh. 237. 5 Taunt. 605. S. C.

^q 3 Wils. 58. 3 Durnf. & East, 657. 1 H. Blac. 541.

^r *Ante*, 753, 4. 765.

^s *Ante*, 753, 4.

^t 8 Co. 162. a. W. Jon. 9. 3 Durnf. & East, 349. 659. 749. 7 Durnf. & East, 474.

^u 703. 4 Taunt. 588. 2 Chit. Rep. 22. (*a*). and see 1 Salk. 269. Cas. temp. Hardw.

^v 119. for the time of awarding a *certiorari*.

in the *former court,* or in the court below.⁹ If it be made [*771] below, a *certiorari* may be had, on alleging diminution, to bring up the record in its amended state; or, if the clerk of the treasury of the Common Pleas attend with the record in the King's Bench, the latter court on motion will order the transcript to be amended by it.¹ And this way of amending the transcript in the King's Bench, is the course of the court, in order to save a *certiorari*; for if the record be right below, the party, upon diminution alleged, may have a *certiorari* of common right for bringing it up.² After error brought in the Exchequer Chamber, upon a judgment of the King's Bench, it is necessary to make the amendment in the latter court; as this differs from the case of a writ of error from the Common Pleas, because that court is supposed to send up the very record, but the King's Bench sends only a transcript.³ When the record in such case is amended, it is either certified into the Exchequer Chamber, upon diminution alleged;⁴ or upon carrying it there, by the clerk of the treasury of the King's Bench, the justices and barons will order the transcript to be amended:⁵ or the transcript may be brought back, and amended in the King's Bench, by the original record.⁶ If there be any *mistake* in the transcript, by the negligence of the clerk, the court above, on carrying up the record, will order the transcript to be amended by it:⁷ and though, after a writ of error, it is not usual to suffer an amendment of the record of an inferior court,⁸ yet where there is a mistake in the transcript, the court above will order it to be rectified.⁹ The clerk of the errors in the Common Pleas, in transcribing the record, by mistake entitled the declaration generally, instead of specially, and error was assigned thereon; after which he amended the transcript, by inserting the special title; and the court of King's Bench would not restore the transcript, to the state in which it stood at the time when the plaintiff in error assigned his error.¹⁰

On an amendment after error brought, it was not formerly usual to allow the plaintiff his *costs* of the writ of error:¹¹ but it is now settled, that they shall be allowed him, provided the amendment be made *after final judgment, and the plaintiff, after notice of [*772] the amendment, do not proceed farther;¹² though if the amendment be made before final judgment,¹³ or the plaintiff proceed after notice

• Poph. 102. 8 Co. 162. a. 2 Rol. Rep. 471. 3 Maule & Sel. 591.

† Poph. 102. Hardr. 505. 1 Marsh. 180. 382. 5 Taunt. 820.

• 2 Rol. Rep. 471. Hardr. 505.

• 1 Salk. 49.

• 2 Str. 837. But see 3 Brod. & Bing. 66. 6 Moore, 135. 9 Price, 432. S. C. where the amendment was first made in the Exchequer Chamber, and afterwards in the King's Bench.

• Cro. Jac. 429. 628. 2 Rol. Rep. 471.

• 1 Rol. Abr. 208.

• *Id.* 209. 2 Str. 837.

• Hardr. 505.

• 1 Rol. Abr. 209, 10. but see Willes, 126. n. *Ante*, 769.

• 1 Wils. 337. Say. Rep. 59. S. C.

• 1 Maule & Sel. 232.

• 3 Mod. 113.

• 3 Lev. 361. 2 Ld. Raym. 897. *Lloyd v. Skutt*, T. 23 Geo. III. K. B.

• 1 Ld. Raym. 95.

† But see an examination of this subject by Best, C. J. in *Richardson v. Mellish*, 3 Bingh. 334.

thereof,^f he shall not be allowed his costs. And when amendments are made upon a writ of error, after verdict, &c. by virtue of the statutes of jeofails, no costs are given; for the construction of those statutes has been, to give judgment for the party upon the writ of error, as if the amendments had been made.^g

^f 1 Salk. 49. *in marg.* *Lloyd v. Stuart*, ^g Cas. temp. Hardw. 314.
T. 23 Geo. III. K. B.

CHAP. XXXI.

OF MAKING UP, AND ENTERING THE ISSUE: AND OF THE
ROLLS OF THE COURTS; WITH THE MANNER OF BRING-
ING IN, AND DOCKETING THEM.

AN *issue* is defined to be a single, certain, and material point, issuing out of the allegations or pleadings of the plaintiff and defendant;^a but it more commonly signifies the entry of the allegations or pleadings themselves: And it is either in *law*, upon a demurrer; or in *fact*, which is triable by the court, upon *nul tiel record*, or by a jury, upon pleadings concluding to the country.

An issue in fact triable by a jury, is either such as arises in the course of an adverse suit, or is directed by some court of law or equity, or framed under the authority of an act of parliament, for the trial of a disputed question; which latter is called a *feigned issue*.^b Two or more issues are sometimes joined in the same cause; as where the defendant demurs and pleads to different counts of a declaration, or the plaintiff demurs and replies to different pleas, or where, in an action against two or more defendants, they appear by different attorneys, and sever in pleading.^c In these cases, there is only one trial of the issues in fact; and the jury who try them assess the damages for the whole cause of action, or against all the defendants, *absolutely*, if the other issues have already been determined in favour of the plaintiff, or otherwise *conditionally*, provided judgment shall be afterwards given for him.

The issue, as dependent on the pleadings, is *general* or *special*. In the King's Bench, in every action wherein the defendant pleads the general issue, or demurs generally to the declaration; on a plea of *plene administravit* by an executor or administrator; in *debt*, when the defendant pleads a special *non est factum*, *comperuit ad diem* to a bail bond, or *nul tiel record* to an action on a judgment or recognizance; in *covenant*, when his plea concludes to the country; and in *trespass*, when he pleads *son assault demeene*, *liberum tenementum*, or not guilty to a new assignment; the issue

^a Co. Lit. 136. a.

^b Append. Chap. XXXI. § 51.

^c See further, as to *issues*, Chitty on Pleading, 1 V. p. 629, &c.

[*774] is made up, on four-penny stamped paper,^d by the attornies: who likewise make up all issues and demurrers upon writs of error, *scire facias*, and *audita querela*, and repleaders, or other matters formerly entered of record.^e In all other cases, both by bill and original, in the King's Bench, the issue, or, as it is commonly termed, the *paper* book, or, upon an issue in law, the *demurrer* book, is made up by the clerk of the papers;^f who charges the plaintiff's attorney *eight pence per folio* for the whole book, and *four pence per folio* for all the pleadings subsequent to the declaration, (which the plaintiff's attorney furnishes him with a copy of,) besides stamps. In the Common Pleas, the issue is in all cases made up, on four-penny stamped paper,^d by the plaintiff's attorney, or, in country causes, by his agent.

Formerly, when the plaintiff in his replication concluded to the country, or demurred, the issue, in the King's Bench, could not have been made up, till a four-day rule had been given and expired, to rejoin, or join in demurrer; but the practice in this respect is now altered, it being a rule in that court, that "in all special pleadings, when the plaintiff takes issue upon the defendant's pleading, or traverses the same, or demurs, so as the defendant is not let in to allege any new matter, the plaintiff may make up the paper-book, without giving a rule to rejoin:"^g but otherwise a rule must be given for that purpose, unless the defendant be bound, by a judge's order, to rejoin *gratis*. If the plaintiff will not make up the paper-book, it may be made up by the defendant: and a rule may it seems be given thereon by the master, for the plaintiff to enter the issue on record; or in default thereof, that it may be entered by the defendant.^h But the more usual way is, for the defendant to rule the plaintiff to enter the issue; and, on his neglecting to do so, to sign a judgment of *non pros*. In the Common Pleas, when the defendant's plea concludes to the country, the plaintiff may add the *similiter* forthwith, and make up and deliver the issue, with notice of trial; but when the plaintiff's replication concludes to the country, he cannot regularly make up the issue, without previously giving a four day rule to rejoin, unless the defendant be under terms of rejoining *gratis*. It is not unusual, however, for the plaintiff's attorney, in such case, to make up the issue forthwith, and deliver it with notice of trial: And where he had added a *similiter* to the replication, and delivered the issue, [*775] with notice of trial, to the defendant's attorney, who accepted it, but did not pay the issue money, in consequence of which the plaintiff's attorney signed judgment, without giving a rule to rejoin, the court held the judgment to be regular, after consulting the prothonotary, who said that the practice was not to give a rule to rejoin, where the defendant had accepted the issue, with a *similiter* added by the plaintiff, and not struck it out.ⁱ In this case, therefore, if the

^d 55 Geo. III. c. 184. *Sched.* Part II. § III.

^e R. T. 12 W. III. a. K. B.

^f Say. Rep. 97. but see 2 Str. 1266.

^g R. T. 1 Geo. II. a. K. B. And for the practice on the crown side, see 6 East, 586.

^h R. F. 11 W. III. (a). K. B.

ⁱ 1 H. Blac. 254. But note, this was before the rule, by which judgment is not allowed to be signed for non-payment of the issue money.

defendant's attorney be not under terms of rejoining *gratis*, and do not mean to accept the issue, he should immediately strike out the *similiter*, and return the issue, with a notice indorsed thereon, that he has struck it out, and will file a demurrer in the office, or that he will accept it as a replication only, and insist on a four day rule to rejoin.^k

The issue contains an entry or transcript of the declaration, and other subsequent pleadings;^l and, in actions by *bill* in the King's Bench, should be made up of the term in which it is joined.^m And it is prefaced, in that court, with a *memorandum*, stating the exhibiting of the bill, and that there are pledges for the prosecution of it.ⁿ The reason for a *memorandum* is, that proceedings by *bill* were formerly considered as the bye business of the court.^o And it varies in four cases; first, when the issue is of the same term in which the cause of action accrued; secondly, when it is of a term subsequent to the cause of action, but of the same term with the declaration; thirdly, when it is of a term subsequent to the declaration, and within four terms after; fourthly, when it is more than four terms after the declaration. In the first case, the *memorandum* is special, stating the bill to have been exhibited on a particular day in term, after the cause of action accrued: In the second case, it states the bill to have been exhibited on the first day of the term in which the declaration was delivered: In the third and fourth cases, it pursues the fact, but with this difference, that in the third case, the term of exhibiting the bill is referred to as *last* past, and in the fourth, as in a certain year of the king's reign.^p But where the issue in the Common Pleas, on a proceeding by *bill* of *Easter* term, was made up and delivered of *Trinity* term, and the whole proceedings appeared thereby to be of that term, without any continuance from *Easter* to *Trinity*, or any *alias prout patet*, which was conceived to be irregular, the court overruled the objection, and thought the continuance, or *alias prout patet*, was not necessary in [*776] the issue paper, but might be entered at any time upon the roll.^q

When the proceedings are entered, in the King's Bench, with a general *memorandum*, which relates to the first day of term, and the cause of action appears in *evidence* to have arisen after the first day of term, the plaintiff may produce the writ, in order to shew that it was really sued out subsequent to the cause of action,^r or his attorney may, it seems, produce the draft of the bill, and prove that it was in fact filed on a subsequent day.^s And where, in a similar case, the fact complained of was admitted by the defendant's plea of *son assault demesne*, the court held it to be well enough; for the plaintiff need not give any evidence on this plea, unless to aggravate damages: and the court will not nonsuit him; because it is amendable

^k Append. Chap. XXXI. § 35.

^l Append. Chap. XXXI. § 1, &c.

^m 3 East, 204.

ⁿ Append. Chap. XXXI. § 1, &c.

^o Gilb. C. P. 47.

^p 1 Saund. 40. (1). 2 Saund. 1. (1).

^q 2 Wils. 203. and see Append. Chap. XXXI. § 47.

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^r 1 Blac. Rep. 312. 3 Bur. 1241. S. C. *Pugh v. Martin*, H. 24 Geo. III. K. B. 1 Bos. & Pul. 263. Forrest, 110. 5 Esp. Rep. 163. 2 Saund. 1. (1). 2 Chit. Rep. 271. 5 Barn. & Ald. 847. 1 Dowl. & Ry. 488. S. C.

^s 3 Stark. *Ni. Pri.* 138.

by a new bill.^c In like manner, when the defendant pleads *plene administravit*,^a or a *tender*,^z he has a right to set up the fact against the fictitious relation, in order to support his plea.

After verdict, a general *memorandum*, by which the cause of action appears to have arisen after the action brought, has been allowed to be rectified, by an examination of the real time of filing the *bill*,^y or of the *bail*,^z to which the bill relates; but the better and more usual way is to file a *new* bill, and amend by it:^a and this may be done, even in a *qui tam* action.^b In a modern case,^c the court gave the plaintiff leave to amend the bill filed, by inserting a special *memorandum* of the day of filing the same, and to carry in a new roll agreeable to the amended bill, and to make the transcript conformable to the new roll, even after a writ of error brought, on payment of costs: But such an amendment cannot, we have seen,^d be made, after the proceedings are entered on record, without leave of the court. And, after obtaining the paper book from the clerk of the papers, with a *memorandum* of the term generally, corresponding with the declaration, neither party has a right to amend it, by making a special *memorandum* of the day of the delivery of the declaration, without an order for leave to amend.^e

[*777] If the plea be of a term subsequent to the declaration, the issue by *bill*, in the King's Bench, contains the entry of an imparlance;^f which, we have seen, is general or special. When a special imparlance is necessary, to enable the defendant to plead any particular plea, it must be entered in the issue; but otherwise the entry of a general imparlance is sufficient: And it is not necessary to enter more than one imparlance, though several terms have intervened between the declaration and the plea.^f When the replication is of a term subsequent to the plea, it is usual for the clerk of the papers to insert continuances in the paper-book; but this does not seem to be necessary.^g

There is no *imparlance* roll in the King's Bench: But in the Common Pleas, when an *original* is actually issued in the first instance, (which however is seldom the case,) or the proceedings are by *bill* filed against an attorney, or member of the house of commons, if the defendant be entitled to an imparlance, it is entered on a roll, called the *imparlance* roll, which is made up of the term the original writ is returnable, or bill filed; and contains an entry of the declaration or bill, and of the defendant's appearance thereto, with the prayer and grant of an imparlance.^h

After the declaration, or imparlance, if there be one, the *plead-*

^c 2 Str. 1271. 1 Wils. 171. S. C.

^a 1 Sid. 432.

^z Cowp. 456. but see 4 Esp. Rep. 72.

^y 1 Sid. 373. 2 Keb. 368. S. C. 1 Vent. 135. 2 Lev. 13. 2 Keb. 790. S. C. and see Carth. 114. 1 Show. 147. S. C.

^b 1 Sid. 432. 2 Lev. 176. T. Jon. 87. 3 Keb. 693. S. C. but see Carth. 113.

^c 1 Str. 583. 2 Str. 1151. 1162. 1 Wils. 104. but see 6 Durnf. & East, 129.

^d *Lloyd v. Skutt*, T. 23 Geo. III. K. B.

^e 7 Durnf. & East, 474. 1 East, 135. S. C. cited.

^f *Ante*, *86.

^g 1 Chit. Rep. 336. and see 1 Maule & Sel. 232. 1 Chit. Rep. 45. 2 Barn. & Ald. 472. 1 Chit. Rep. 277. S. C. *Ante*, 771.

^h Append. Chap. XXXI. § 2.

ⁱ 1 Co. 75.

^j See further, as to the *imparlance* roll, Bac. Abr. tit. *Amendment*, D. 2 Gilb. C. P. 42, 3, 4. Boote's Suit at Law, last edition, p. 72. 91, &c. 1 Wils. 183.

ings are next copied, in their proper order, beginning each with a new line; and under them, the clerk of the papers is directed to write the names of the counsel by whom they are signed, as well on the part of the plaintiff, as of the defendant.¹ Formerly, if there had been a plea in abatement, upon which a *respondeat ouster* was awarded, and afterwards the defendant had pleaded in chief, it was necessary to enter the plea in abatement, and judgment of *respondeat ouster*, in making up the issue, as well as the plea in chief;^k and where they were entered in the plea roll, but omitted in the record of *nisi prius*, the court on that ground arrested the judgment, the record of *nisi prius* not appearing to be in the same cause.^l Afterwards a rule was made in the King's Bench, that for the future, a copy of the plea in chief only should be delivered and paid for;^m and agreeably thereto, where the plea in abatement and judgment of *respondeat ouster* were omitted in the plea roll, the court held the omission to be "immaterial; particularly, as the defendant had [*778] accepted and paid for the issue."ⁿ

An issue in fact by *bill* in the King's Bench, when triable by the country, concludes with the award of the *venire facias*, or process to bring in the jury, as follows: *Therefore let a jury "thereupon come, before our lord the king, at Westminster, on (the return of the writ, being a day certain), by whom, &c. and who neither, &c. to recognize, &c. because as well, &c.; the same day is given to the parties aforesaid at the same place."*^p If there are several issues in fact, triable by the country, the conclusion is as follows: "*Therefore as well to try this issue, as the said other issue, or issues, above joined between the parties aforesaid, let a jury thereupon come, &c.*"^q Or if there are several defendants, who plead separately, the award of the *venire facias* states between whom the different issues are joined, thus: "*Therefore as well to try this issue, as the said other issue, or issues, above joined between the said A. B. and C. D. &c. let a jury thereupon come, &c.*"^r

In an action of *debt* on bond, conditioned for the performance of covenants, when breaches are assigned in the declaration or replication, or suggested after an issue of *non est factum*, &c. on the statute 8 & 9 W. III. c. 11. § 8. the *venire* should be awarded specially, to try the issue; and in case it be found for the plaintiff, to inquire of the truth of the breaches, and assess the damages sustained thereby.^s So where the defendant in *trespass* pleads to part of the declaration, and lets judgment go by default as to the residue, or pleads to the declaration, and lets judgment go by default as to a new assignment, there is a special award of the *venire*, as well to try the issue, as to assess the damages on occasion of the residue of the trespasses, or of the trespasses newly assigned.^t And so, if there are several defendants, some of whom plead, and others let judgment

¹ R E. 18 Car. II. K. B.

^k 7 Mod. 51. 1 Salk. 5.

^l 1 Ld. Raym. 329. Carth. 447. 5 Mod. 399. 12 Mod. 189. S. C.

^m 7 Mod. 51. 1 Salk. 5.

ⁿ 3 Bur. 1682.

^o For the explanation of these *et cets.*

^p *ras*, see the writ of *venire facias*, *post*, Chap. XXXV.

^q Append. Chap. XXXI. § 1.

^r *Id.* § 7.

^s *Id.* § 8.

^t *Id.* § 9.

^u *Id.* § 10.

go by default, the *venire* is awarded as well to try the issues, as to assess the damages against the latter defendants.^a In these cases, as it is a rule that the jury who try the issues shall assess the whole of the damages,^{*} there is an entry of an *unica taxatio*, as follows: "*And because it is convenient and necessary that there be but* [*779] *one taxation of damages in this suit, therefore let such taxation and the giving of judgment in this behalf be stayed, until the trial and determination of the said issue, or issues, above joined between the parties aforesaid; or (where one defendant lets judgment go by default,) between the said A. B. and the said E. F.*" (the other defendant.⁷)

If there be several issues, in fact and in law,^{*} or several issues in fact, one triable by the country, and another by the court on *nul tiel record*,^a the award of the *venire* is, as well to try the former, as to assess the damages upon the latter; *absolutely*, if the issues in law, or of fact triable by the court, have been already determined in favour of the plaintiff, or otherwise *conditionally*, in case judgment shall be thereupon given for him.^b In these cases, if the issues in law or of fact triable by the court are first determined, and the plaintiff is in consequence entitled to damages upon part of the declaration, or against one of several defendants, there is an entry of an *unica taxatio*, to postpone the assessment of such damages, until the trial of the issues in fact: But if the issues in fact are first tried, an *unica taxatio* is unnecessary; for in such case, the jury who try these issues, will of course assess the damages.^c

In actions by *original* in the King's Bench, the clerk of the papers makes up the issue or paper book, of the same term with the declaration;^d or it may be entitled of the term issue is joined, as in actions by *bill*:^e and it begins with a copy of the declaration, without a *memorandum*.^f And it is not necessary to enter imparlances, if the pleadings are of a subsequent term.^g This however is sometimes done; and imparlances are commonly entered by the clerk of the papers, between the plea and replication,^h where they are of different terms, in making up the issue by original, as well as by bill. The award of the *venire facias* by original is as follows: "*Therefore it is commanded to the sheriff, that he cause to come before our lord the king, on (a general return day), wheresoever he shall then be in England, twelve, &c. by whom, &c. and who neither, &c. to recognize, &c. because as well, &c.*"ⁱ But where the sheriff is a party, or interested in the cause, the *venire* is awarded to the coroner;^k or if there be two sheriffs, and one of them is interested, [*780] rested, to the other;^l and if the coroner, as well as the sheriff,

^a *Id.* § 11, 12. and see 2 Bos. & Pul. 163.

^{*} 11 Co. 5, &c.

⁷ Append. Chap. XXXI. § 11.

^b *Id.* § 15.

^c *Id.* § 13, 14.

^d 1 Saund. 109. (1). 2 Saund. 300. (3).
Id. a. (4).

^e 2 Saund. 300. a. (4).

^f Imp. K. B. 9 Ed. 621.

^g *Id.* (a). 363.

^h Append. Chap. XXXI. § 3.

ⁱ *Id.* *ibid.*

^j *Id.* § 4.

^k *Id.* § 3.

^l 2 I. il. P. R. 124. Append. Chap. XXXI. § 26, 27.

¹ 5 Maule & Sel. 144. Append. Chap. XXXI. § 24, 5.

be interested, the *venire* is awarded to two persons, appointed by the master or prothonotaries, called *elisors*.^m When the venue is laid in a county *palatine*, instead of the common award of a *venire facias*, there is a special award of a *mittimus* to the justices there, commanding them to issue the jury process, and when the cause is tried, to send the record back again to the court above.ⁿ At what time the practice originated, of sending records by *mittimus* into counties palatine, is not quite clear; but so late as the 11 W. III. the court expressly said, they could not order a trial in the county palatine of *Lancaster*, and therefore they sent the record to be tried in *Yorkshire*, as being the next county.^o In the Common Pleas, the issue is entitled of the term in which it is joined;^p and made up in the same manner as in the King's Bench by original. In the Exchequer, the issue begins with the *placita*, or stile of the court, of the term it is joined: And when the issue is of the same term with the declaration, it merely contains a transcript of the pleadings, after the *placita*, beginning each with a new line, without any *memorandum* or imparlance: but when the issue is of a subsequent term, a *memorandum* is prefixed to the declaration, and the entry of an imparlance to the plea.^q

When a fair and impartial, or at least a satisfactory trial cannot be had in the county where the action is laid, the court must be moved, on an affidavit of the circumstances, for leave to enter a suggestion on the roll, with a *nient dedire*, in order to have the trial in the next adjoining county.^r And as the suggestion in such case is not traversable, the court will see that it is necessary, before they give leave to enter it.^s The cause in that case must be tried in the next adjoining county, even though it be a county palatine.^t And by the statute 38 Geo. III. c. 22. § 1. it is enacted, that "in every action, whether the same be transitory or local, which shall be *prosecuted or depending in any of his majesty's courts of [*781] record at *Westminster*, and in every indictment removed into his majesty's court of King's Bench by writ of *certiorari*, and in every information filed by his majesty's attorney or solicitor general, or by the leave of the court of King's Bench, and in all cases where any person or persons shall plead to or traverse any of the facts contained in the return to any writ of *mandamus*, if the venue in such action, indictment or information, be laid in the county of any city or town corporate in *England*, or if such writ of *mandamus* be directed to any person or persons, body politic or corporate, the court in which such action, indictment, information or other pro-

^m 3 Fast, 141. Barnes, 465. Append. Chap. XXXI. § 28.

ⁿ Append. Chap. XXXI. § 16, &c.

^o 12 Mod. 313. and see Say. Rep. 47. 1 Durnf. & East, 368. It is justly supposed by Mr. Manning, in his practice of the Exchequer, p. 296. (x). that the practice of sending records, by *mittimus*, into counties palatine, was adopted in the King's Bench, from the ancient practice of the Exchequer: and he refers to Bro. Abr. tit. *Triallea*, pl. 39. 58. 130. 133. 146.

from which it appears, that this mode of trial is much more ancient than the reign of William the third.

^p Imp. C. P. 358. Append. Chap. XXXI. § 5.

^q Append. Chap. XXXI. § 6.

^r *Id.* § 29.

^s 3 Bur. 1333. By Ld. Mansfield and the Court, E. 23 Geo. III. K. B. *Atkinson qui tam v. Harvey*, T. 28 Geo. III. K. B.

^t 7 Durnf. & East, 735. 1 Durnf. and East, 363. *contra*.

ceeding shall be depending, may, at the prayer and instance of any prosecutor or plaintiff, or of any defendant, direct the issues joined in such action, indictment, information or other proceeding, to be tried by a jury of the county next adjoining to the county of such city or town corporate, and award proper writs of *venire* and *distingas* accordingly, if the court shall think proper."^a The cities of *London* and *Westminster*, *Bristol* and *Chester*, and the borough of *Southwark*, are excepted out of this statute.² When the venue is laid in a county different from that wherein the cause of action arose, the practice is first to change the venue into the latter county, on the usual affidavit, and then to move for a writ of *venire facias*, to have the cause tried by the jury of the adjoining county.⁷ But though a penal action be removed out of the proper county into another for trial, yet the cause of action must still be proved to have happened within the proper county, where the venue is laid.² On an indictment for a misdemeanour, the court of King's Bench will permit a suggestion to be entered on record, for the purpose of carrying the trial into an adjoining county, when there appears to be a reasonable ground on the affidavits, for believing that a fair and impartial trial cannot be had in the county where the venue is laid; and the suggestion need not state the facts from whence such inference is to be drawn.^a But a *certiorari* was refused, to remove an indictment for murder from *Yorkshire*, in order to have a trial at bar, or in another county, on the ground that the prisoners, who had pleaded to the indictment, could not have a fair and impartial trial in the former county.^b

When the action is laid in a place where the king's writ of *venire* does not run, as in *Wales*,^c or *Berwick upon Tweed*,^d &c. it is [*782] awarded to the sheriff of the next *English* county, upon a suggestion that the issue ought to be tried there. In Sir *Peter Delme's* case^e it was settled, and has ever since been the practice of the court, that if either party would suggest any special matter, about awarding the *venire* out of the common course, he should give a copy of it to the adverse party, and allow him a reasonable time to consider it, before a *nient dedire* is entered.^f And when there are several plaintiffs or defendants in a personal action, and one of them dies before issue joined, his death should be suggested, in making up the issue; but otherwise it need not be suggested, till the judgment roll is made up.^g

An issue in *fact*, triable by the *record*, may conclude by praying

^a Append. Chap. XXXI. § 30. The 12th section of this statute, providing that no indictment shall be removed into the next adjoining county, except the person applying for such removal shall enter into a recognizance in 40*l.* for the extra costs, &c. does not relate to indictments sent by the King's Bench to be tried in the next adjoining county, after a removal thither by *certiorari*. 4 East, 208.

² § 10.

⁷ 7 Taunt. 385.

² 9 East, 296.

³ Barn. & Ald. 444.

³ Dowl. & Ryl. 301.

^c Append. Chap. XXXI. § 31.

^d 2 Bur. 855. 2 Blac. Rep. 1036. and see Append. Chap. XXXI. § 32.

^e 10 Mod. 198.

^f 1 Str. 235. Append. Chap. XXXI. § 19. 21, &c. And for the nature and effect of a *nient dedire*, see 1 Str. 183.

^g 1 Bur. 363. Barnes, 469. and see Append. Chap. XXIII. § 43. Chap. XXXIX. § 11.

an inspection of it, if the record be of the *same* court;^b or, whether it be of the *same* or a *different* court, the issue may conclude by giving the party pleading a day to produce it.^c And on an issue in *law*, the demurrer book concludes as follows: "*But because the court of our lord the king now here is not yet advised, what judgment to give of and upon the premises, a day is given to the parties aforesaid, before our said lord the king at Westminster, (if by bill, or, if by original, wheresoever, &c.) on (the day appointed for argument,) to hear judgment thereon, for that the court of our said lord the king now here is not yet advised thereof, &c.*"^d

In the King's Bench, the *general* issue or *paper* book being made up, is delivered to the defendant's attorney or agent; and if there are several defendants, who appear by different attorneys, a copy should be delivered to each of them. In the margin of the paper book, a conditional rule is given by the clerk of the papers, signifying, that unless the defendant receive the paper book, and return it by a particular day, to be enrolled, a writ of inquiry will issue, or rule for judgment be entered.^e If a paper book be made up and delivered in term time, or within *four* days exclusive after term, with a rule given thereon, by the clerk of the papers, for bringing the same to be enrolled, and the defendant's attorney do not, within *four* days after the delivery thereof, bring it back and join with the plaintiff in the special issue or demurrer, or waive his special plea, and give the general issue, or demurrer to any special issue tendered, *judgment may be entered and signed, as if no plea had been [*783] pleaded. And the clerk of the papers has no discretion to give a rule to return the paper book in less than *four* days, even though the defendant be under terms to take short notice of trial.^f But when a plea is not put in in time, so that a paper book may be made up and delivered in term, or within *four* days after, yet if it be made up and delivered within *eight* days after the term, the defendant's attorney is obliged to receive it, and return it again in *four* days after the delivery, or judgment may be signed.^g

If a plea be pleaded in term, or in time after the term, and the paper book be not made up and delivered within *eight* days exclusive after term, if it be an issue to be tried in *London* or *Middlesex*, or a demurrer, the other party is not bound to deliver back the book, till within the first *four* days of the next term; but if it be an issue to be tried at the *assizes*, the defendant's attorney should deliver back the book within *four* days *exclusive*^h after the delivery thereof, and join in the special issue, or give the general issue, and take notice of trial; or else the plaintiff's attorney may sign judgment by default, as if the defendant had not pleaded.ⁱ And when a paper book is not returned within the four days, the plaintiff's attor-

^b Append. Chap. XXXIII. § 2. 4.

^c *Id.* § 3. 5.

^d *Id.* Chap. XXX. § 3, 4.

^e *Id.* Chap. XXXI. § 33.

^f *Hale v. Smallwood*, E. 35 Geo. III. K. B.

^g R. T. 1 Geo. II. (a). K. B.

^h Imp. K. B. 352. but see R. T. 1 Geo. II. (a). where it is said, that if the paper book be of an issue in *fact*, the four days for keeping it are reckoned *exclusive*; if on a demurrer, or issue in *law*, they are *inclusive*.

ⁱ R. T. 1 Geo. II. (a). K. B.

ney may afterwards refuse to accept it, and sign judgment;^a but judgment cannot be signed after the paper book is accepted, though it be not returned in due time.

Within the time limited for that purpose, the defendant's attorney or agent either returns the paper book or not; and if returned, he either returns it in the state it was delivered to him, or if he has not been ruled to abide by his plea, he may waive the special pleadings, and give the general issue;^c or, if the *similiter* to the replication has been added by the plaintiff, he may strike it out and demur.^d In the latter case, the plaintiff having joined in demurrer, a demurrer book is made up by the clerk of the papers, and delivered over to the defendant's attorney; who must return it in twenty-four hours, unless the demurrer be special, and the defendant has not been ruled to abide by his plea, in which case he may still waive his special plea and demurrer, and give the general issue. If the paper book [*784] be returned *with the general issue, the plaintiff's attorney makes up and delivers the issue afresh, in the common form. In the Common Pleas, there being no paper book, the issue, when made up, is delivered to the defendant's attorney, or, in country causes, to his agent in town.^e

On the delivery of the issue,^a or returning the paper book in the King's Bench,² the defendant was formerly obliged to pay for copies of the pleadings, except in actions by a pauper,⁷ or against an attorney,² or prisoner;² and in a *qui tam* action, he paid double.^b This was called issue money; on non-payment of which, the plaintiff might have signed judgment.^c But, by a late rule of both courts,^d "no judgment shall be signed for non-payment of issue money; but the same shall remain to be taxed, as part of the costs in the cause." Which rule is construed to extend, in the King's Bench, not only to general issues, but also to all special issues, and the paper and demurrer books made up thereon.^e

By accepting the issue, or returning the paper book, the defendant's attorney admits it to be properly made up:^f And therefore if there be any variance therein from the pleadings delivered, or other irregularity in making it up, the defendant's attorney or agent, instead of accepting it, should take out a judge's summons, and obtain an order, for setting it right; as he cannot otherwise take advantage of the irregularity, on a motion in arrest of judgment, or for a new trial.^g

^a Doug. 197. 4 Durnf. & East, 195. 2 Chit. Rep. 242. but see Doug. 67. 1 Durnf. & East, 16. *semb. contra*.

^c 2 Salk. 515.

^d For the form of the notice of having struck out the rejoinder, &c. see Append. Chap. XXXI. § 34, 5.

^e Cas. Pr. C. P. 94. 109. Barnes, 251.

^f R. T. 12 W. III. 7 Mod. 51. Say. Rep. 77. *Wenham v. Tristram*, H. 21 Geo. III. K. B.

^g 5 Durnf. & East, 400.

^h *Id.* 509.

ⁱ Say. Rep. 77.

^a Cas. Pr. C. P. 35. 2 Wils. 11.

^b But see 3 Durnf. & East, 137.

^c Cas. Pr. C. P. 35. 91. Barnes, 239. 243. 263. 275. 2 Blac. Rep. 1098.

^d R. H. 35 Geo. III. K. B. & C. P. 6 Durnf. & East, 218. 2 H. Blac. *oct. ed.* 551. 1 Bos. & Pul. 292. (b).

^e 6 Durnf. & East, 477. R. M. 36 Geo. III. K. B. and see 1 Bos. & Pul. 292.

^f 2 Str. 1131. 1266. Say. Rep. 154. 3 Bur. 1682. and see Barnes, 475. 2 Wils. 160.

^g 2 Wils. 243. and see 1 Chit. Rep. 277, 8. (a).

After issue joined, the plaintiff should enter it on record, and proceed to argument, if an issue in law, or to trial, if an issue in fact: And if he neglect to do so, the defendant, in the King's Bench, may compel him, by obtaining a rule from the master,^b on the back of the issue, if delivered, entering it with the clerk of the rules, and serving a copy on the plaintiff's attorney. In the Common Pleas, the defendant's attorney should get a side-bar or treasury rule from the secondaries, for the plaintiff's attorney to enter the issue on record, within *four* days after notice given,^c and serve him with a copy thereof. But the defendant cannot give a rule to reply, and enter the *issue*, in the same term: And, in the King's [*785] Bench, if the action be laid in *London* or *Middlesex*, the defendant ought not to give a rule for the plaintiff to enter his issue the same term it is joined, unless notice of trial has been given.^k In the Common Pleas, whether the action be laid in *London* or *Middlesex*, or in the *country*, the defendant can in no case give a rule to enter the issue, the same term it is joined, but must stay till the next term;^l and, in a *country* cause, the plaintiff is no ways bound to enter his issue the same term.^m In the Exchequer, it is said, a defendant may give a rule for the plaintiff to enter his issue, the same term in which it is joined, whether notice of trial has been given or not.ⁿ

The plaintiff being ruled to enter the issue in the King's Bench, must enter it, if in *London* or *Middlesex*, and bring the record into the office, within *four* days after notice of the rule: If in the *country*, before the *continuance* day of that term: Otherwise, a *non pros* may be signed, and the defendant shall have his costs.^o And where one of two defendants in *trespass*, after having pleaded, separately signed a *non pros* for not entering the issue, the court held the judgment to be regular.^p But a judgment of *non pros* cannot be regularly signed in that court, unless there be a rule to enter it of the same term in which judgment is signed;^q nor after the issue is entered, though it be not entered within the time allowed by the rule:^r And where it appeared by affidavit, that the plaintiff's attorney had mislaid the papers, the court ordered the defendant's attorney to give him a copy of the issue, the better to enable him to enter it.^s In the Common Pleas, the plaintiff's attorney must in all cases carry in the roll and docket it, within *four* days after service of the rule to enter the issue, or the defendant's attorney may sign a *non pros*: and the four days are reckoned exclusively of the day of serving the rule; therefore if it be served on *Friday*, the plaintiff has all the *Tuesday* following to enter the issue.^t

^b Append. Chap. XXXI. § 36, 7.

^c *Id.* § 38.

^d R. M. 4 Anri. (c). K. B.

^e Imp. C. P. 363.

^f R. M. 4 Ann. (c). K. B. R. M. 1654.

^g 21. C. P.

^h Man. Ex. Pr. 320.

ⁱ 2 Lil. P. R. 87. R. M. 4 Ann. (c). K.

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B. Append. Chap. XXXI. § 39, 40.

^j *Philpot v. Muller*, T. 23 Geo. III. K.

B.

^k 1 Maule & Sel. 478.

^l 1 Durnf. & East, 16, but see 4 Durnf. & East, 195. *semb. contra.*

^m 1 Str. 414.

ⁿ Barnes, 318.

It may not be improper in this place, to take a general view of the *rolls* of the different courts, on which the *issue* and other matters of record are entered; with the *entries* thereon, and by whom, [*786] and *in what manner they are made; and the time and mode of *bringing* in and *docketing* them.

In the King's Bench, the rolls of the court are divided into *crown* and *plea* rolls: The former contain entries of indictments and informations, with the proceedings thereon; the latter, the proceedings on the *plea* side of the court. There are also, on the *crown* side, rolls of *estreats* of *finés* and *amerciaments*, &c. The *plea* rolls are delivered out in blank to the attornies, by a stationer appointed for that purpose by the chief justice;^a who also provides a skin of parchment, called a *docket*, containing the *numbers* for the rolls of each term, which is kept by the clerk of the judgments till the *essoins* day of the following term, when it is delivered over to the clerk of the treasury: From this docket the numbers are delivered to the attornies, by whom they are marked in common figures at the bottom of each roll.

In the Common Pleas, the rolls are *plea* or *common*.² The former relate to pleas of *land*, and contain the entries of proceedings in *real* actions, including common recoveries; the latter are confined to the entries in *personal* and *mixed* actions. These rolls are delivered out in blank, in *files* of *twenty* each,⁷ by the clerk of the *essoins*, after having previously *numbered* them with numeral letters, in the old court hand: But there is this difference between the mode of numbering the rolls in the King's Bench and Common Pleas; that in the former court, there is only one number for each entry, though it be made on several rolls; but in the latter court, each roll is separately numbered. The *plea* rolls, in the Common Pleas, are delivered by the clerk of the *essoins* to the clerk of the *recoveries*, the clerk of the *king's silver*, and the *prothonotaries*; the *common* rolls, to the *filacers* and *prothonotaries*.² And formerly, it appears that the latter were delivered by the prothonotaries to their clerks [*787] only;^a who had access allowed them for their instruction to the records of the court;^b but there is now no distinction in this respect between clerks and attornies. And every attorney or clerk who receives any roll, either *plea* or *common*, from the protho-

^a R. T. 11 & 12 Geo. II. K. B.

² R. H. 8 Car. I. § 8. R. M. 1654. § 7. R. E. 34 Car. II. reg. 3. R. E. 5 W. & M. reg. 2. R. M. 2 Geo. I. C. P. The term *plea* roll, it will be observed, has various significations: In the King's Bench, we have seen, it means the roll on which proceedings are entered on the *plea* side of the court: But in the Common Pleas, as stated above, it is confined to pleas of *land*, and contains the entries of proceedings in *real* actions; and it is sometimes used, in a more limited sense, to signify the roll on which the *pleadings* are entered, previous to the *issue*.

⁷ As to these files, see R. E. 12 Jac. I. § 2. R. M. 1649. reg. 1. § 2. C. P.

^a R. M. 1649. reg. 1. § 3, 4. C. P. and see R. E. 34 Car. II. reg. 3. C. P. by which the clerk of the *essoins* is not to deliver any *post* rolls, or other rolls of the Common Pleas, to any attorney or clerk of that court, but to the respective prothonotaries, and other officers who have a right to such rolls. But this rule, so far as it respects the *post* rolls, which are now delivered to the attornies, has fallen into disuse.

^b R. M. 6 & 7 Eliz. § 1. R. F. 12 Jac. I. R. H. 8 Car. I. R. M. 1649. reg. 1. R. M. 1654. § 5. and see R. T. 21 Car. II. reg. 1, 2. C. P.

^c R. M. 1654. § 5. C. P.

aries, is required to sign and set his hand to their book, for the receipt of such roll.* Besides the rolls which have been mentioned, there are others delivered out *unnumbered*, in the Common Pleas, to the clerk of the *warrants*: On these are entered the *enrolment* of deeds, &c. which are filed in the bundle of *plea* rolls; and *warrants of attorney* in personal and mixed actions, which are filed in the bundle of *common* rolls of that court. There are also long slips or *presses* of parchment, delivered out unnumbered, to the clerk of the *errors* in the King's Bench and Common Pleas; on which are entered the transcripts of judgments on writs of error.

In the Exchequer of Pleas, the court not having jurisdiction of *criminal* matters, or *real* actions, there are no *crown* rolls, as in the King's Bench, nor of pleas of *land*, as in the Common Pleas: but the rolls are denominated *plea* or *common*; and are delivered out by the master of the office of pleas, to the attornies or clerks in court; but they are not numbered, as in the other courts.⁴

Of the *plea* rolls in the King's Bench, the first *twenty*, and of the *common* rolls in the Common Pleas, the first *three hundred* are reserved for the *filacers*; and are thence called *filacers* rolls: On these are entered recognizances of bail, in actions by *original*, &c. In general, the rolls are denominated, according to the subject matter of them, the *warrant of attorney* roll;⁵ the *process* roll;⁶ the *recognizance* roll;⁷ the *imparlance* roll;⁸ the *plea* roll;⁹ the *issue* roll;¹⁰ the *judgment* roll;¹¹ the *scire facias* roll;¹² and the roll of proceedings on writs of *error*,¹³ and *false judgment*:¹⁴ to which may be added, the rolls of deeds and awards,¹⁵ &c.

The entries on the rolls were formerly made, in the King's Bench, by the clerks of the chief clerk;¹⁶ as, in the Common Pleas, they were made by the clerks of the prothonotaries,¹⁷ who [1788] were called *entering* clerks: but they are now made in both courts by the *attornies*; and ought to be written in a full fair hand, with a large margin of an inch at least, and a convenient distance at the top for binding up the same, and at the bottom, that the writing be not rubbed out.¹⁸ In this manner, the proceedings may be entered on both sides of the roll, beginning on the back, over against the first line of the first warrant of attorney, and taking care, if possible, to leave a sufficient space at the end for the *committitur*, and entry of satisfaction, &c. If the space left be not sufficient for the subsequent entries, one or more rolls may be added, which are

* R. E. 34 Car. II. reg. 3. C. P.

⁴ 4 Inst. 109.

⁵ *Ante*, *110. *Post*, 792.

⁶ *Ante*, 182, 3.

⁷ *Ante*, *302.

⁸ *Ante*, 777.

⁹ *Ante*, 786. (b).

¹⁰ *Post*, 792.

¹¹ *Post*, Chap. XXXIX.

¹² *Post*, Chap. XLIII.

¹³ *Post*, Chap. XLIV.

¹⁴ For a particular account of these rolls, and their contents, see the *Introduction to the Practical Forms*, p. xviii. &c.

¹⁵ R. M. 1654. § 14. R. T. 1 Jac. II. R. M. 5 Ann. K. B. And for the times within which the clerks must anciently have accounted with the secondary, in the King's Bench, see R. E. 15 Car. II. reg. 3. R. H. 15 & 16 Car. II. reg. 1. R. T. 20 Car. II. K. B.

¹⁶ R. E. 12 Jac. I. R. H. 8 Car. I. R. M. 1649. reg. 1. R. M. 1654. § 5. C. P.

¹⁷ R. H. 1657. K. B. And for the manner of making entries on the rolls in the Common Pleas, see R. E. 12 Jac. I. § 2. R. M. 1649. reg. 1. § 1, 2. R. M. 1654. § 7. R. T. 29 Car. II. reg. 2 C. P.

called *riders*, with references at the bottom of the preceding roll. In the Exchequer, the entries are made by the attornies, or clerks in court.

The rule with regard to bringing in rolls in the King's Bench is, that "every attorney ought to bring them into the office of the clerk of the treasury, fairly engrossed, by the following times, that is to say, the rolls of *Trinity*, *Michaelmas*, and *Hilary* terms, before the *essoin* day of every subsequent term, and the rolls of *Easter*, before the *first* day of *Trinity* term."^a And formerly, no roll could have been brought in with a *post terminum*, without leave of the court:^c But now, in order to accommodate the attornies, the *custos brevium* usually attends the day but one before every term, to receive and file their rolls.^d And a roll may be had of a preceding term, as a matter of course, by applying to the clerk of the treasury; or if a roll has not been brought into the treasury in time, it may afterwards be brought in, on paying some small additional fees to the officers of the court.^e

In the Common Pleas, by the ancient course and usage of the court, no attorney or prothonotary's clerk ought to carry the rolls into the country;^f but ought duly and fairly to enter, and then bring in and docket their rolls in the prothonotary's office, from whence they received the same, in such convenient time as that they may be examined by the prothonotaries, and bound up by the clerk of the essoins, by the *essoin* day of every subsequent term, [*789] *Easter* only *excepted.^g And rules were from time to time made by the court, appointing particular times for the attornies or clerks to bring their rolls into the prothonotaries office.^h By the last of these rules, the rolls of *Easter* were to be brought into the prothonotaries office, on or before the first day of *Trinity* term; the rolls of *Trinity* term, on or before *Michaelmas* day; those of *Michaelmas* term, on or before the *sixth* day of *January*; and those of *Hilary* term, *four* days before the feast of *Easter*.^b But now, by indulgence, the rolls of *Michaelmas* term are taken in and docketed in *Hilary* term, those of *Hilary* in *Easter*, of *Easter* in *Trinity*, and of *Trinity* in *Michaelmas* term; otherwise they must be filed with the clerk of the essoins.^c And on bringing in their rolls to the prothonotaries, after judgment signed, the attornies and clerks are ordered at the same time to produce the paper books, whereon such judgments are signed, that so the prothonotaries may better examine the days entered on the margin of the roll of each particular judgment, and see that they agree with the days signed by the prothonotaries in the paper books.^d

The proceedings being entered on the roll, a *number* should be

^a R. E. 5 W. & M. reg. 1 M. 9. W. III. T. 10 W. III. M. 5 Ann. K. B.

^b R. E. 9 W. III. K. B. 1 Salk. 87. 2 Ld. Raym. 850. 6 Mod. 191.

^c R. M. 9 W. III. (a). K. B. 1 Sel. Prac. 535.

^d 1 East, 409.

^e R. E. 12 Jac. I. § 1. R. M. 1649. reg. 1.

§ 1. R. M. 1654. § 7. R. E. 34 Car. II. reg. 3. C. P.

^f R. M. 1649. reg. 1. C. P. in principio.

^g R. E. 12 Jac. I. § 2. R. M. 1649. reg.

1. § 2, 3. R. M. 1654. § 7. R. T. 29 Car. II. reg. 5. R. E. 34 Car. II. reg. 3. C. P.

^h R. E. 34 Car. II. reg. 3. C. P.

ⁱ Imp. C. P. 439.

^j R. T. 29 Car. II. reg. 5. C. P.

procured for it, in the King's Bench, from the clerk of the judgments, if it be a roll of the same term, or otherwise from the clerk of the treasury; and the roll being numbered, is carried in and *docketed*^c with the clerk of the judgments, who takes for the entries, after which it is carried to the clerk of the treasury, by whom it is bound up and kept in the treasury of the court. In the Common Pleas, the rolls are *docketed* with the prothonotaries, on the *docket* roll, or common *docket*.^d And when brought in, they are delivered by the prothonotaries to the clerk of the essoins, who binds up the same;^e and is the officer appointed to docket them *alphabetically* under the statute 4 & 5 W. & M. c. 20. § 2. And, by a rule of *court made upon that statute,^h "the several and respective [*790] officers of this court shall deliver in all their rolls of *Trinity*, *Michaelmas* and *Hilary* terms, to the clerk of the essoins, before the essoin day of the several terms following, and their rolls of *Easter* term, on or before the *first* day of *Trinity* term following: and the officer who shall not bring or send in all his rolls of the said several terms, at the times aforesaid, shall pay to the clerk of the essoins, for every roll brought in after, twelve pence, according to the ancient practice of this court." By the same rule,^h "the *plea* rolls of every term shall be brought in to the clerk of the essoins, within three weeks after the end of the term following; and in default thereof, there shall be likewise paid to the clerk of the essoins, for every *plea* roll brought in after, twelve pence:"ⁱ and the prothonotaries, when they bring in their rolls, are to deliver to the clerk of the essoins, an account of the *carets* in writing, with the attornies' names who took the said rolls out of their office.^k After the rolls have been brought in, the clerk of the essoins must not part with them:^l And no alteration or amendment can be made in any roll, or in any writing issuing out of any office of this court, by any attorney or his clerk, or any other person, but only by the officer or his clerk in whose office the same shall be made or entered.^m

The rolls being docketed and carried in, are bound up in vellum covers, in one or more parts or bundles for each term, and filed numerically by the clerk of the treasury in the King's Bench, or treasury keeper in the Common Pleas; after which they are deposited in presses, or open stages, appropriated for that purpose, in the treasury of the court, or office of pleas in the Exchequer. In the

* For the form of the docket paper, see Append. Chap. XXXI. § 49.

^c It appears by the prothonotaries return to a select committee of the House of Commons, on the public records, dated 26 Feb. 1800, that the *docket* rolls, or *dockets* of records at Westminster, commence as follows: Those of the chief prothonotary, about the third of Edward VI. those of the 2nd prothonotary, in the first of Henry VIII. and those of the 3rd prothonotary, in the second of Queen Elizabeth.

^d R. M. 1649. reg. 1. § 4. R. M. 1654. § 7. C. P. It seems from the former of

these rules, that the rolls were formerly delivered by the prothonotaries to the clerk of the warrants, who delivered them to the clerk of the essoins: but this practice is now disused, at least as to the common rolls, which are taken directly from the prothonotaries to the clerk of the essoins.

^e R. E. 5 W. & M. reg. 2. C. P.

^f *Id. ibid.* and see R. M. 2 Geo. 1. C. P.

^g R. M. 2 Geo. 1. C. P. and see R. M. 1654. § 7. R. E. 34 Car II. reg. 3. C. P.

^h R. M. 1649. reg. 1. § 4. C. P.

ⁱ R. M. 6 & 7 Eliz. § 3. C. P.

King's Bench, the rolls are preserved in the treasury, from the beginning of the reign of *Henry* the sixth: In the Common Pleas, from that of *Henry* the eighth: The earlier rolls, from the year 1195, to the end of the reign of *Henry* the fifth, in the former court, and in the latter, from 1199 to the year 1509, are deposited in the Chapter house of *Westminster Abbey*.^a The recovery rolls, and deeds enrolled, in the reigns of *Henry* the eighth, *Edward* the sixth, and *Philip* and *Mary*, and also from the 1st and 2nd to the 24th and 25th of *Elizabeth* both inclusive, are bound up and intermixed with the common rolls in the Common Pleas; but since that time, the *plea* and *common* rolls are kept in distinct bundles. In the Exchequer of Pleas, the rolls are preserved as far back as the [*791] reign of *Edward* the first;^b and are nearly complete from the beginning of the reign of Queen *Elizabeth*. The most ancient of these rolls were formerly kept in a passage behind the court of Exchequer at *Westminster*; but they are now deposited in the new towers over the entrance of *Westminster* hall. The more modern ones, beginning with the reign of *Charles* the first, are preserved in the office of the clerk of the pleas, in *Lincoln's Inn*.^c

In the King's Bench and Common Pleas, the top or uppermost roll of every bundle is inscribed with the *placita*, or stile of the court, of the term it is made up. In the King's Bench, the *placita* begins thus, "Pleas before our lord the king at *Westminster*, of — term," &c. adding to the *crown* rolls these words, "amongst the pleas of the king;" and is witnessed in the name of the chief justice: In the Common Pleas, the *placita* of *plea* rolls, begins as follows, "Pleas of *land* enrolled at *Westminster*, before — (the chief justice,) and his brethren, justices of his majesty's court of Common Bench, of — term," &c.: and the first *plea* roll usually contains an entry of the admission of the officers of the court. The *placita* of *common* rolls in that court begins thus, "Pleas, with the warrants of attorney thereof, enrolled," &c.: and there is, in each court, an inscription on the vellum cover which encloses the bundle, denoting its contents. In the rolls subsequent to that which contains the *placita*, the *term* is written at the top of each entry, in the King's Bench, thus, "As yet of — term," &c.; and is witnessed in the names of the chief justice, and chief clerk; but in the Common Pleas, the term is not mentioned at the top, but written by the prothonotary's clerk, at the bottom of each roll. Formerly it seems, that in the King's Bench, several entries might have been made on the same roll, in different actions, as is still done in the Common Pleas; but now there is a separate roll for each cause. In the Exchequer, the rolls not being numbered, there is a *placita* at the top of each entry, beginning as follows, "Pleas before the barons of the Exchequer at *Westminster*, among the pleas of — term," &c.

^a Jones's *Index* to records, Pref. xxii.

^b Burt. Excheq. in pref. And for a particular account of these rolls, see *id.* p. 421, &c. 441, &c.

^c For a more particular account of the rolls and records of the different courts,

see the report of a select committee to the House of Commons, on the state of the public records of the kingdom, ordered to be printed in July, 1800. p. 112, &c. 119, &c. 233, 4.

The *issue*, in the King's Bench, must always be entered on a roll of the term in which it is joined: Therefore, where the general issue is pleaded of one term, and the *similiter* is not added till the following term, the issue must be entered of the term in which the *similiter* is added; and if entered of the term in which the general [*792] issue was pleaded, the plaintiff may sign a judgment of *non pros.*^a In the Common Pleas, it is likewise a rule, that "all issues shall be entered of the term they are joined, and not of any other subsequent term; and that the prothonotaries shall not give any licence or authority for the entry of any such issues, nor shall the clerk of the essoins deliver out any *post* rolls for the doing thereof, nor the clerk of the treasury permit any such issues to be entered in the treasury, upon any account whatsoever;"^b and, by a subsequent rule, "every issue shall be so entered on record, notwithstanding any consent given by the attornies or their agents on either side to the contrary."^c

In order to enter the issue, a roll must be obtained, of the term it is joined, from the stationer appointed to deliver out the rolls in the King's Bench,^d or prothonotaries in the Common Pleas; which is called the *issue roll*.^e This roll is prefaced, in the King's Bench, with an entry of the *warrants* of attorney for the plaintiff and defendant, which is said to have been introduced by *Wright* Chief Justice, in the reign of *James* the second;^f previous to which time, the warrants of attorney were entered on a separate roll.^g In the Common Pleas, the warrants of attorney are made out, of the term issue is joined, on a plain piece of parchment, and filed with the clerk of the warrants; by whom they are entered on distinct rolls, which are bound up in the bundle of *common* rolls in that court.

In practice, however, it is not usual to enter the issue at full length, if triable by the country, until after the trial, unless the plaintiff be ruled to enter it; but only to make an *incipitur* on the roll, at the time of passing the record of *Nisi Prius*. An *incipitur* however is necessary; it being declared, by rule of court in the King's Bench,^h that "no record of *Nisi Prius* shall be sealed, or passed at the *Nisi Prius* office, before the issue is fairly entered on record, or an *incipitur* thereof; and such entry, with the record of *Nisi Prius*, first brought to and signed by the secondary." And in the Common Pleas it is a rule, that "the prothonotaries shall not sign any records of *Nisi Prius*, until the issue, or an *incipitur* thereof, shall be fairly entered upon record, and the fees first paid for the entry thereof."ⁱ

*Hitherto we have spoken only of issues made up and [*793] entered by the *plaintiff*: But in actions of *replevin*, *prohibition*, and *quare impedit*, wherein the defendant is considered as an actor, the issue may be made up and entered by the *defendant*, as well as the

^a *Per Cur. M.* 43 Geo. III. K. B. T. 43
Geo. III. K. B. 3 East, 204.

^b *R. E.* 5 W. & M. reg. 1. C. P. Barnes, 328.

^c *R. H.* 11 Geo. I. C. P.

^d *R. T.* 11 & 12 Geo. II. K. B. *Ante*, 786.

^e *Append. Chap. XXXI.* § 41, &c.

^f *R. E.* 4 Jac. II. K. B. *Ante*, 91.

^g 1 *Ld. Raym.* 509. 2 *Ld. Raym.* 895. *Carth.* 517. 1 *Balk.* 88.

^h *R. M.* 5 Ann. reg. 1. K. B.

ⁱ *R. E.* 5 W. & M. reg. 1. C. P. and see *R. M.* 1654. § 21. C. P.

plaintiff.^b And there is a rule of court, in the King's Bench,^c that "if the plaintiff *demur* in law to the defendant's plea, rejoinder, or rebutter, and the defendant join in demurrer, the plaintiff's attorney shall enter the demurrer of record; and in default thereof, upon a rule given by the secondary,^d it may be entered of record by the defendant's attorney." Accordingly, if the plaintiff demur, or take issue on the defendant's plea, rejoinder or rebutter, and the defendant, in case of a demurrer, join therein, and the plaintiff will not make up the book, and enter it on record, the defendant may, pursuant to this rule, make up the book, and deliver it to the plaintiff, who has a right to enter the issue, at any time before the expiration of the rule given by the secondary; which rule ought to be served on the plaintiff, at the same time the book is delivered to him. If the plaintiff do not enter the issue, the defendant may, at the expiration of the rule;^e and, on an issue triable by the country, give notice of trial by *proviso*.^e Or, instead of entering the issue himself, the defendant may it seems give the plaintiff a four day rule to enter it; and in default thereof, sign a judgment of *non pros*.^f

^b Append. Chap. XLV. § 64.

^c R. E. 11 W. III. K. B.

^d Append. Chap. XXXI. § 37.

^e R. E. 11 W. III. (a). K. B. *Ante*, 774.

^f Rules and Orders of K. B. Ed. 1795. p. 176, 7. and see Lee's Prac. Dic. 391. *Ante*, 774.

CHAP. XXXII.

OF ARGUING DEMURRERS.

WHEN the issue in law, upon a demurrer, has been entered on record, either party may move the court for a *concilium*, and proceed to argument.^a

When there are several issues, in law and in fact, there has been great diversity of opinion upon the question, which of them should be first tried or determined. According to the earlier authorities, if a man demur to part, and take issue on other part, or if the declaration be against two defendants, and one demur, and the other take issue, the courts shall determine which they please first;^b though it was reckoned the more orderly way to give judgment first on the demurrer.^c In another book it is said, that the issue in fact ought to be first tried; because if this be found for the plaintiff, the jury who try it may assess conditional damages, as to the demurrer.^d And according to later cases, where there are several issues, in law and in fact, the determination of the issue in law may be either before or after the trial of the other, at the option of the plaintiff.^e

But though the plaintiff, in ordinary cases, has a right to marshal his own proceedings, provided he conform to the rules and practice of the court, yet still if the court see that the ends of justice will be better promoted by first determining the question of law on the demurrer, they will postpone the trial of the issue in fact.^f And accordingly in a late case, where the plaintiff brought three actions of *trespass* against three several defendants, for different parts which they took in the same transaction; one against the speaker of the House of Commons, who justified under a warrant he had issued, by order of the house, for arresting and committing to the Tower the plaintiff, a member of the house, for a breach of privilege, in publishing a libel upon the house, to which plea the plaintiff demurred; another against the serjeant at arms, who pleaded not guilty, and also justified under the authority of the speaker's warrant, *to which the plaintiff replied an excess in the manner of exe- [*795] cuting the warrant, by a military force, and with improper and

^a R. T. 1 Geo. II. (a). K. B. Barnes, 163. C. P.

^b Co. Lit. 72. a. Gilb. C. P. 57.

^c *Id. ibid.*

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^d Say. Dam. 115. cites Lutw. 875.

^e 2 Lil. P. R. 85. R. E. 23 Car. I. K. B.

^f 2 Saund. 300. (3).

^g 13 East, 41. 47.

unnecessary violence, on which issue was joined to the country; and the third against the constable of the Tower, who received and detained the plaintiff as a prisoner, and who also justified under a warrant from the speaker for that purpose, in which issue was also taken to the country, on several facts stated in such justification; and notice of trial was given by the plaintiff in the two last causes, which stood for trial at bar on a day fixed, but the plaintiff, though still within the time allowed by the general rules and practice of the court, had not set down his demurrer in the first cause for argument; the court of King's Bench, on motion by the attorney general, on behalf of the serjeant at arms and constable of the Tower, postponed the trial of the issues in those causes, until after the argument on the demurrer in the cause against the speaker: because the right, just, and distinct consideration of the questions which arose on the issues of fact, and the true measure of damages in the causes against the serjeant at arms and constable of the Tower, depended in a great measure upon the decision of the issue in law joined in the other action against the speaker: and though the same question of law might ultimately be raised on motion in the two former actions, yet it could not be considered so conveniently to the court, to whom the decision of such question belonged, or so advantageously to the party who should prove to be in the right, as upon the demurrer, which presented the question of law distinct from the questions of fact.^s

In practice, however, it is usual and advisable, when there are several issues in law and in fact, and the course of proceeding rests with the parties, to determine the issue in law first, for the following reasons; first, that the determination of an issue in law is generally more expeditious, and less expensive, than the trial of an issue in fact: secondly, that if the issue in law go to the whole cause of action, and be determined against the plaintiff, it is conclusive, and there is no occasion afterwards to try the issue in fact; whereas, if the issue in fact be first tried, and found for the plaintiff, he must still proceed to the determination of the issue in law, and if that be found against him, he will not be allowed his costs of the trial of the issue in fact:^a thirdly, that this mode of proceeding will prevent confusion and embarrassment at the trial, particularly when contingent damages are to be assessed; and, lastly, that whether the demurrer go the whole or part of the cause of action, if the [*796] plaintiff proceed to argue it first, and the court are of opinion against him, he may amend as at common law; but after the cause has been carried down to trial, he cannot amend any farther than is allowable by the statutes of amendments.ⁱ

The *concilium, dies concilii*, or day to hear the counsel of both parties,^k was formerly moved for, in the King's Bench, upon reading the record in court;^l but now it is a motion of course, which only requires a counsel's signature. Still, however, the record is taken *pro forma*, to the clerk of the papers, who marks it "*read*,"

^s 13 East, 27.

ante, 753, 4.

^a 2 Saund. 300. (3). and *see* 2 Marsh.

^k R. E. 2 Jac. II. K. B.

364, 5.

^l *Id.* 2 Lil. P. R. 421.

ⁱ 2 Blac. Rep. 920. *See* *quere*; and *vide*

and signs the initials of his name on the brief or motion paper; which being carried to the clerk of the rules, he draws up the rule for a *concilium* thereon,^m which is a four day rule, and then the cause is entered for argument with the clerk of the papers.ⁿ It has been determined not to be necessary to serve the rule for a *concilium* upon demurrer, in the King's Bench, or to give notice of putting it in the paper; it being in strictness the defendant's duty to search, since he must expect the plaintiff will proceed:^o but in practice it is usual to serve a copy of the rule on the defendant's attorney; and it seems that it ought to be served, when there is a *real* demurrer.^p Signing a *concilium* is considered, in that court, as a step in the cause, so as to make it unnecessary to give a term's notice.^q

Previously to the day appointed for argument, copies of the demurrer books should be delivered, in the King's Bench, by the plaintiff or his attorney, on unstamped paper, to the chief-justice and senior judge, and by the defendant or his attorney, to the two other judges; and if either party, or his attorney, neglect to deliver the books, the other party, or his attorney, ought to deliver the same.^r In all books to be delivered to the justices of this court, the names of the counsel who signed the pleadings, ought to be inserted:^s and the exceptions intended to be insisted upon in argument, should be marked by the party who objects to the pleadings, in the margin of the books he delivers;^t and he should leave a copy of such exceptions, with the two judges to whom he does not deliver books.^u In causes entered for argument on *Tuesday*, the books, we have seen, are to be delivered to the chief-justice, and the rest of the judges, on the *Saturday* preceding; and in those entered for argument on *Friday*, they are to be delivered on the *Tues-* [*797] *day* preceding.^x And formerly, when there was no argument on demurrer, and the cause had been struck out of the paper, when called on, no one appearing to pray judgment for the plaintiff, it must have been entered *de novo*:^y but now, when counsel has had his brief in due time, and is accidentally or inadvertently absent at the time the paper is called over, the court will, on his moving for that purpose, allow him to take judgment as if he had been present.^z

In the Common Pleas, the record is brought into court by the clerk of the dockets, on moving for a *concilium*; which is a motion of course, requiring only a serjeant's name: and the motion paper being handed to one of the secondaries, he will mark the roll as *read* in court: after which, the rule is drawn up with the secondary, and a copy of it served on the defendant's attorney; and at the time of drawing up the rule, the secondary will set down the cause for argument in the court book. This must be done *four* days exclusive before the day of argument. All special arguments on demurrers, and other special arguments, are by a late rule to be heard, in

^m Append. Chap. XXXII. § 1.

ⁿ R. T. 1 Geo. II. (a). K. B.

^o 2 Str. 1242, and see 1 Chit. Rep. 718.

^p Imp. K. B. 355.

^q 3 Durnf. & East, 530.

^r R. M. 17 Car. I. K. B.

^s R. E. 18 Car. II. K. B.

^t R. E. 2 Jac. II. K. B. revived by R. H. 38 Geo. III. K. B.

^u 1 Smith R. 361, 2. *per* Lawrence, J.

^x R. T. 40 Geo. III. K. B. 1 East, 131. and see R. E. 2 Jac. II. (a). K. B. *Ante*, 510.

^y 2 Chit. Rep. 402.

^z *Id.* (u).

the Common Pleas, on the day next before the sitting day at *nisi prius* in *Middlesex*, and the day next after the sitting day at *nisi prius* in *London*, and on no other days;^a and no argument is allowed in that court, on the four *last* and four *first* days of the term;^b but if a *sham* demurrer be put in towards the end of the term, the court, on its being mentioned by a serjeant, on moving for a *concilium*, will it seems order it to be argued in the last day of term.^c It is a rule, in the Common Pleas, that the plaintiff's attorney shall deliver all the demurrer books to the lord chief-justice, and the rest of the judges;^d and the names of the serjeants who signed the pleadings, are to be inserted therein; and the number roll and day of argument set down on the outside of each book.^e The exceptions intended to be insisted upon in argument should also, as in the King's Bench, be marked in the margin of the books;^f and if each party take objections to the pleadings of the other, it is said to be the duty of each to deliver books, with the points intended to be made on both sides, stated in the margin;^g which books, by a late [*798] rule,^h are to be delivered to the lord chief-justice, and the other judges, *two* days (exclusive of the day of such delivery,) before the day on which the cause shall have been set down for argument. It was formerly a rule in both courts, that the party neglecting to deliver books could not be heard, until he had paid for two copies of them.ⁱ But a subsequent rule having declared, that no judgment should be signed for non-payment of the issue money, the courts, in the construction of this latter rule, have held it to extend to the paper-books on a demurrer;^k and of course, if they are not paid for, the costs of them must remain to be taxed, like the issue money, as part of the costs in the cause.

The courts having given their opinion on the demurrer, a peremptory rule is drawn up with the clerk of the rules in the King's Bench, or secondaries in the Common Pleas, that judgment be entered for the plaintiff or defendant, as the case may be. And after interlocutory judgment on demurrer, the defendant shall not come to arrest the judgment, on return of the inquiry, for any exception that might have been taken on arguing the demurrer; for the parties cannot be said to come as *amici curiæ*, and the courts will not suffer any one to tell them, that the judgment they gave on mature deliberation is wrong: but it is otherwise in the case of judgment by default, for that is not given in so solemn a manner; or if the fault arise on the writ of inquiry or verdict, for there the party could not allege it before.^l

The judgment for the plaintiff, on demurrer to a plea or replication in abatement, is not final, but only a *respondeat ouster*.^m In

^a R. M. 47 Geo. III. C. P. *Ante*, 510.

^b R. T. 12 Geo. I. (a). C. P.

^c Imp. C. P. 348. 352.

^d R. M. 6 Geo. II. reg. 3. C. P. and see R. E. 27 Car. II. C. P.

^e Barnes, 164.

^f R. H. 48 Geo. III. C. P. 1 Taunt. 203.

^g 7 Taunt. 72, 3.

^h R. M. 49 Geo. III. C. P. 1 Taunt. 412.

Ante, 511.

ⁱ R. M. 17 Car. I. K. B. R. M. 6 Geo. II. reg. 3. C. P. and see R. E. 27 Car. II.

C. P.

^k 6 Durnf. & East, 477. 1 Bos. & Pul. 292.

^l 1 Str. 425. 2 Marsh. 326.

^m Gilb. C. P. 53. 1 Ld. Raym. 594. Say.

Rep. 46. 2 Wils. 367. *Ante*, 693.

other cases, it is interlocutory or final, according to the nature of the action. If the action be for damages, in *assumpsit*, &c. it is interlocutory:^a and the plaintiff, after giving a peremptory rule for judgment with the clerk of the rules in the King's Bench, or secondaries in the Common Pleas, should sign interlocutory judgment, on four-penny stamped paper, with the clerk of the judgments in the former court,^b or prothonotaries in the latter,^c and proceed to execute a writ of inquiry for assessing the damages;^d or, in an action on a bill of exchange or promissory note, &c. he may have them assessed by "reference to the master." And, on the execution [*799] of a writ of inquiry, after judgment on demurrer, the defendant is not allowed to controvert any thing, but the amount of the sum in demand.^e When the judgment is *final*,^f as in *debt* for a sum certain, the plaintiff, in the King's Bench, after giving a peremptory rule for judgment, should get it stamped with a *ten* shilling stamp, and may immediately proceed to tax his costs; and the master, having the roll brought him by the clerk of the treasury, will mark the amount of the costs thereon, as well as upon the rule.^g In the Common Pleas, the plaintiff, after drawing up the rule with the secondaries, should procure a *ten* shilling stamped paper, enter an *incipitur* thereon, and get it marked by the clerk of the warrants; and then take it to the prothonotaries, and their clerk will sign the judgment; upon which the prothonotaries will tax the costs.^h

When the defendant's plea goes to bar the action, if the plaintiff demur to it, and the demurrer is determined in favour of the plea, judgment of *nil capiat* should be entered, notwithstanding there may be also one or more issues in fact; because, upon the whole, it appears that the plaintiff had no cause of action. So, where several pleas are pleaded, since the statute 4 & 5 Ann. c. 16. all of them going to destroy the action, and one or more issues are joined on some of the pleas, and there are one or more demurrers to the rest; if the court determine the demurrers in favour of the defendant, *before* the issues are tried, they shall not be tried: and if *after* the trial, it will make no difference; for in each case, judgment of *nil capiat* shall be given against the plaintiff.ⁱ

^a Append. Chap. XXXII. § 2, 3, 6, 7.
B. 12.

^b *Burton v. Henley*, M. 57 Geo. III. K. B.
1 Sel. Pr. 375. *second. Imp. K. B.* 341. 1
Crompt. 183. Lee's Prac. Dic. 1 V. 390.
contr.

^c Barnes, 229.

^d Append. Chap. XXXII. § 2, 3, 7, 8.
12.

^e 1 H. Blac. 541. Append. Chap.
XXXII. § 7.

^f 1 Bos. & Pul. 368.

^g Append. Chap. XXXII. § 4, 5, 9, 10,
11.

^h Imp. K. B. 358.

ⁱ Imp. C. P. 353.

^j 1 Saund. 80. (1). and see Append.
Chap. XXXII. § 13, 14.

CHAP. XXXIII.

OF THE ISSUE, AND TRIAL BY THE RECORD.

THE issue we are now treating of, arises upon a plea or replication of *nul tiel record*. The plea of *nul tiel record*, when pleaded to an action on a judgment, or other matter of record in this country, is always concluded with an averment, and prayer of judgment *si actio*, &c.^a unless where an action of *debt* is brought here, on a judgment in *Ireland*, in which case the plea of *nul tiel record* must conclude to the country:^b And if it deny the existence of a record of the *same* court, the replication thereto may conclude with a prayer *that it be viewed and inspected by the court;*^c but when the record is of *another* court, the plaintiff shall have a day given him to bring it in.^d

When a judgment, or other matter of record, in the *same* court is pleaded, and the plaintiff replies *nul tiel record*, the replication may conclude as follows—"and this he is ready to verify, &c. and because the court of our lord the king now here will advise themselves, upon inspection and examination of the record by the said (defendant) above alleged, a day is given to the parties aforesaid, before our said lord the king at Westminster, until, &c."^e or, instead of replying, the plaintiff may crave *oyer* of the record, or at least a note in writing of the term and number roll; and if it be not given him in convenient time, he may sign judgment. This practice was originally confined to pleas in abatement;^f but was afterwards extended to pleas in bar:^g and accordingly it is now settled, that wherever a judgment, or other matter of record, in the *same* court is pleaded, the party pleading it must, on demand, give a note in writing of the term and number roll, whereon such judgment or ^[*801] matter of record is entered and filed, or in default thereof, the plea is not to be received.^h When the record is of

^a 2 Wils. 114.

^b 5 East, 473. 2 Smith R. 25. S. C. and see 1 Barn. & Ald. 153. 9 Price, 3. *Ante*, 702. Append. Chap. XXXIII. § 1.

^c Herne, 278. 2 Lutw. 1514. Barnes, 336. Append. Chap. XXXIII. § 2.

^d 2 Salk. 566. 3 Blac. Com. 330, 31. Append. Chap. XXXIII. § 3.

^e Dyer, 227, 8. 2 Lutw. 1514. 2 Salk.

566. Carth. 517. 1 Ld. Raym. 360. S. C. 7 Taunt. 30. 2 Marsh. 354. S. C. Append. Chap. XXXIII. § 4.

^f Keilw. 95, 6. Carth. 453. 517. 1 Ld. Raym. 347. 550. 2 Ld. Raym. 1179.

^g 2 Str. 823.

^h R. T. 5 & Geo. II. (b). K. B. Imp. C. P. 340. *Ante*, 636.

another court, the plaintiff may either conclude his replication of *nul tiel record*, by giving the defendant a day to bring it in,¹ or with an averment and prayer of the debt and damages.² In the former case, the issue is complete upon the replication;³ but in the latter, there ought to be a rejoinder, that there is such a record,⁴ &c. And, in the Common Pleas, the replication of *nul tiel record* to a plea of judgment recovered, need not it seems have a serjeant's hand.⁵ A judicial writ, issuing out of the court of King's Bench, is a matter of record: and therefore where, in an action of *debt* on bail bond, the defendant pleaded that no bill of *Middlesex* issued against the defendant in the original action, and the plaintiff replied that it did issue, as appears by the record of the file of writs, &c. concluding his replication with a verification to the record, the court held that the replication was proper.* But a recognizance is not a record, until it be enrolled; and therefore where the defendant, in *assumpsit* on bills of exchange, &c. pleaded that "the plaintiff was indebted to him, by virtue of a recognizance taken in the court of Exchequer, which was still in force, as by the said recognizance remaining in the said court before the barons will appear," without stating that it was enrolled; a replication, that the plaintiff was not so indebted, concluding to the country, was holden good on special demurrer, inasmuch as the plea did not state a debt due by recognizance, which was matter of record.⁶

This issue is triable by the record itself, if it be of the same court; or by the *tenor* of the record, if it be of a different court.⁷ When the record is of the *same* court, and the plaintiff avers its existence, notice is given, in the King's Bench, to the defendant's attorney, that he will produce it on a particular day: But where the existence of the record is averred by the defendant, the plaintiff's attorney gives him a four day *rule* to produce it, which he obtains from the master on the paper book; and having entered it with the clerk of the rules, serves a copy on the defendant's attorney. This rule may it seems be given, where the defendant has pleaded a judgment recovered, to which there is a replication of *nul tiel record*, concluding with a "verification and prayer of damages, and a [*802] rejoinder entered for the defendant, that there is such a record, and a day given for its production; and the defendant cannot afterwards strike out the rejoinder, and return the paper book, with notice that he will rejoin in due time."⁸

In the Common Pleas, when the *plaintiff* avers the existence of the record, a day is given him by the roll, to bring it into court. And where the plaintiff delivered the book, and gave himself a day to bring in the record, but did not bring it in on that day, and the plaintiff afterwards offered the record, and moved it might be read,

¹ Append. Chap. XXXIII. § 5.

² Barnes, 161. 2 Wils. 113.

³ Cas. Pr. C. P. 56. Pr. Reg. 227, 8. Barnes, 161. 335, 6. Com. Rep. 533. 2 Bos. & Pul. 302. Append. Chap. XXXIII. § 5.

⁴ 1 Id. Raym. 550. Append. Chap. XXXIII. § 6. and see Chitty on Pleading,

1 V. p. 571, 2. 2 Chit. Rep. 241. (a).

⁵ 2 Blac. Rep. 816. *Ante*, 725. but see

2 Wils. 74. *contra*.

⁶ 1 Kenyon, 345. Sav. Rep. 299. S. C.

⁷ 1 Barn. & Ald. 153.

⁸ Bul. Ni. Pri. 230. Gilb. Evid. 26. 2 Bur. 1034.

⁹ 2 Chit. Rep. 241. *Id.* 401. S. C.

the motion was refused by the court, it not being brought in on the day the plaintiff had given himself to produce it:⁶ but the plaintiff in this case was afterwards allowed to continue the day for bringing in the record.⁷ When the *defendant* avers the existence of the record, the plaintiff is allowed, in the Common Pleas, to give him a day to bring it into court, so as it be *four* days after the delivery of the issue: And when the proceedings are by *original*, and a general return day is given to bring in the record, the defendant ought to be called to bring it in, at the rising of the court on that day; and if he fail, the rule for judgment should be, unless cause be shewn on the appearance day of that general return, and the record may be brought in on that or any intervening day: but when the proceedings are by *bill* against an attorney, and the day given to bring in the record is a day certain, it cannot be brought in after that day; but on that day, at the rising of the court, the defendant ought to be called to bring it in; and if he fail, the court will appoint the day to be inserted in the rule for judgment *nisi causa*." This rule is drawn up, on producing the issue roll in court, without any motion.

On the day appointed for producing the record, the issue, being previously entered, is brought into court by the clerk of the treasury in the King's Bench, or clerk of the dockets in the Common Pleas; and proclamation being made by the crier, for producing the record, it is or is not produced. If produced, the party producing it is entitled to judgment, that he hath *perfected* the record; but otherwise judgment is given for the adverse party, that he hath *failed* in producing it.⁸ When the defendant pleads *nul tiel record* of a judgment, &c. the record is commonly produced by the plaintiff; and in that case, the master in the King's Bench, who reads the issue and compares it with the record, will mark on the draft of the issue, that [*803] the plaintiff hath produced the record; upon which the clerk of the rules will give a rule for judgment, which is stated to be on an issue of *nul tiel record*, and expires in four days.⁹ In the Common Pleas, the rule for judgment¹⁰ is given with the secondaries, who read the issue, and compare it with the record on which the action is founded; and, on the expiration of the rule, the plaintiff may sign final judgment.¹¹ When the defendant pleads a judgment recovered, and the plaintiff replies *nul tiel record*, the defendant, on being called in court, commonly fails to produce the record; and in that case, the roll being marked by the master, the plaintiff in the King's Bench may immediately sign interlocutory judgment, on *four-penny* stamped paper, and proceed to execute a writ of inquiry; or, in an action on a bill of exchange or promissory note, to have the damages assessed by reference to the officer of the court. In the Common Pleas, there is a rule given by the secondaries, before interlocutory judgment is signed; which rule is *peremptory*, in actions for damages, and the plaintiff may thereupon immediately sign interlocutory judgment, and proceed as before directed: But in

⁶ Barnes, 343, 4.

⁷ *Id.* 84, 5.

⁸ Barnes, 264, 5.

⁹ 3 Salk. 151. and see 7 Durnf. & East,

447. (d).

¹⁰ Imp. K. B. 346.

¹¹ Append. Chap. XXXIII. § 7.

Imp. C. P. 340.

debt for a sum certain, there is a rule for judgment given in both courts, on the defendant's not producing the record, which is only a rule *nisi*, unless cause be shewn in *four* days,^b at the expiration of which, if no cause be shewn, the plaintiff may sign final judgment, on a *ten* shilling stamped paper, with the clerk of the judgments in the King's Bench, or prothonotaries in the Common Pleas.

If the defendant plead in abatement, another action depending for the same cause, and the plaintiff afterwards discontinue such action, the issue on *nul tiel record* must be found against him; because the plea was true at the time of pleading it: but if a recovery be pleaded in bar, and the judgment afterwards reversed, before the day given to bring in the record, there, upon *nul tiel record*, the issue must be found for the plaintiff; because, by the reversal, the record is avoided *ab initio*.^c To a plea of justification in *trespass*, under a *distringas*, the plaintiff replied, that before the *distringas* issued, he appeared to the previous writ sued out by the defendant, to wit, a *clausum fregit* issued out of the Common Pleas, *prout patet*, &c.; and on a rejoinder of *nul tiel record*, the court held, that the record of an appearance to a *clausum fregit* issued out of Chancery, did not support the replication; and that the words which followed the *scilicet*, being material could not be rejected.^d

*When the record is of a *different* court, the mode of proceeding for bringing in the tenor of it, is by *certiorari*; which, we have seen,^e is a writ issuing sometimes out of Chancery, and sometimes out of the King's Bench. And when *nul tiel record* is pleaded to the record of a superior court, or court of equal jurisdiction, there is no way to have it, but by *certiorari* and *mittimus* out of Chancery;^f for one court is not bounded by the other, in point of jurisdiction, nor can they write to each other to certify their records: But the Chancery may, by its original constitution, award a *certiorari*, for bringing up the tenor of the record of a superior court, and afterwards send it by *mittimus* to another; and the certifying such tenor does not hinder the court where the record is, from proceeding upon it: And this method was contrived, to communicate evidence of the record from one superior court to another, without the actual removal of the record itself.^g

If a recovery in an inferior court be declared on, or pleaded in a superior one, and denied, the *certiorari* may be issued out of the superior court,^h as well as from the court of Chancery.ⁱ And on this writ, when the superior court doth not send for the record of an inferior one, to see whether they keep within the limits of their jurisdiction, but merely, on *nul tiel record*, to know whether there be such a record or not, it is sufficient to certify the *tenor* of the record;^k and in Chancery they seldom certify any thing more, for that court does not in general send for the record of the inferior one, to

^b Append. Chap. XXXIII. § 8.

^c 1 Ld. Raym. 274. 2 Ld. Raym. 1014.

1 Salk. 329. S. C.

^d 2 New Rep. C. P. 463.

^e *Ante*, 399.

^f 2 Bur. 1034. and see Cro. Car. 297.

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^g Gilb. Exec. 145. 153. 169. and see Gilb. Evid. 15.

^h Cro. Eliz. 821.

ⁱ Gilb. Exec. 148, 9. 170.

^k *Id.* 143. Dyer, 186, 7. 3 Salk. 296. 2 Atk. 317, 18.

bound their jurisdiction, but to send it to other courts by *mittimus*.¹ But when the record is to be proceeded upon in a superior court, the record itself must be returned.²

On a replication of *nul tiel record* to a plea in abatement, the judgment for the plaintiff is not final, but only a *respondent ouster*.³ for failure of record in this case is not peremptory.⁴ In other cases, the judgment is interlocutory or final,⁵ as upon demurrer. When the judgment is *final*, the rule in the Common Pleas, as well as in the King's Bench, is only *nisi*, unless cause be shewn within *four* days, in order that the defendant may have that time to move in arrest of judgment: But when the judgment is *interlocutory*, that reason fails, and there is no occasion for a four day rule; because the [*805] defendant may move in arrest of judgment, after the inquiry is executed.⁶ And as the defendant, we have seen,⁷ may bring in the record in the Common Pleas, on any intervening day between the giving of the rule and the appearance day, the secondaries in that court certify upon the rule, that no cause hath been shewn; which certificate is produced to the prothonotaries' clerk, at the time of signing final judgment.

¹ Gilb. Exec. 145.

² 2 Atk. 317. *Ante*, 403.

³ Append. Chap. XXVII. § 6, 7.

⁴ Carth. 517. 1 Ld. Raym. 550. *Ante*,

693. 798.

⁵ Append. Chap. XXXIII. § 9, &c.

⁶ Barnes, 264. and see Imp. K. B. 363.

420.

⁷ *Ante*, 802.

CHAP. XXXIV.

OF TRIALS BY THE COUNTRY, AT BAR OR NISI PRIUS;
AND OF THE STEPS PREPARATORY TO THE LATTER, AND
CONSEQUENCES OF NOT PROCEEDING TO TRIAL, &c.

TRIALS by the country are at bar or *nisi prius*. Before the statute *Westm. 2.* (13 *Edw. I.*) c. 30. civil causes were tried either at the bar, before all the judges of the court, in term time; or when of no great moment, before the justices in *Eyre*: a practice having very early obtained, of continuing the cause from term to term, in the court above, provided the justices in *Eyre* did not previously come into the county where the cause of action arose; and if it happened that they arrived there within that interval, then the cause was removed from the jurisdiction of the justices at *Westminster*, to that of the justices in *Eyre*.^a Afterwards, when the justices in *Eyre* were superseded, by the modern justices of assize, it was enacted, by the above statute, that "inquisitions to be taken of trespasses, pleaded before the justices of either *bench*, shall be determined before the justices of assize, unless the trespass be so heinous, that it requires great examination; and that inquisitions of other pleas, pleaded in either bench, wherein the examination is easy, shall be also determined before them; as when the entry or seisin of any one is denied, or in case a single point is to be inquired into: But inquisitions of many and weighty matters, which require great examination, shall be taken before the justices of the benches,^b &c.; and when such inquests are taken, they shall be returned into the benches, and there judgment shall be given, and they shall be enrolled." Since the making of this statute, causes in general are tried at *nisi prius*; trials at bar being only allowed in causes which require great examination.^b In the Common Pleas, a writ of right may it seems be tried at *nisi prius*;^c but if the *mise* be joined thereon, it must be tried by the grand assize; and the court will not permit it to be tried by a jury, instead of the grand assize,^d though both parties [*807] desire it.^d And if the *nisi prius* clause be omitted in the writ of summons, and the knights come from a distant county, and appear at bar, the court of Common Pleas will not compel them to be sworn,

^a 3 *Blac. Com.* 352.^b 2 *Balk.* 648.^c 2 *Saund.* 45. *c. f.* 1 *Taunt.* 415.^d 1 *Bos. & Pul.* 192.

unless the demandant will undertake to pay their expenses.* The statute of *nisi prius* extending only to the courts of King's Bench and Common Pleas, whenever an issue is joined in the Exchequer, to be tried in the county, there is a particular commission, authorizing the judges of assize to try it.^f

When the crown is immediately concerned, the attorney-general has a right to demand a trial at bar.^g In all other cases, it is entirely in the discretion of the court,^h governed by the circumstances of the case.ⁱ Even if the parties consent, such a mode of trial cannot be had without leave of the court.^k The grounds on which this trial ought to be granted, are the great value of the subject matter in question, the probable length of the inquiry, and the likelihood that difficulties may arise in the course of it.^l In *ejectment*, it is said, the rule has been not to allow a trial at bar, except where the yearly value of the land is one hundred pounds;^m and value alone,ⁿ or the probable length of the inquiry, is not a sufficient ground for it: But difficulty must concur; and in order to obtain it upon that ground, it is not sufficient to state generally, in an affidavit, that the cause is expected to be difficult; but the particular difficulty which is expected to arise, ought to be pointed out, that the court may judge whether it be sufficient.^o And in a modern instance, the court refused a trial at bar in *ejectment*, on the mere allegation of length, and probable questions of difficulty, in a cause respecting a pedigree.^p In the Common Pleas, a trial at bar has been granted upon terms, in an action for criminal conversation.^q But they refused it in *ejectment*, on a question of sanity, where it would have occasioned delay, and some of the witnesses were old and infirm, and not able to travel to *Westminster*.^r So, in a cause concerning rights of chase, involving documentary evidence of great length and antiquity, together with much oral testimony, that court would not grant the plaintiff a trial at bar; a [*808] new trial *having recently been refused in the King's Bench, where another defendant, who had contested the same rights, had obtained a verdict.^s

If one of the justices of either bench, or a master in Chancery, be concerned, it is a good cause for a trial at bar, be the value what it may.^t And it is said, that such trial was never denied to any officer of the court, nor hardly to any gentleman at the bar.^u The plaintiff may have a trial of this nature, by the favour of the court, though he sue in *forma pauperis*.^v but when the plaintiff is poor, the court will not grant it to the defendant, unless he will agree to take *nisi*

* 1 Taunt. 415.

^f Bul. Ni. Pri. 304. Append. Chap. XXXVI. § 8.

^g 1 Str. 52. 644. 2 Str. 816. 1 Barnard. K. B. 88. S. C.

^h Say. Rep. 79.

ⁱ 1 Durnf. & East, 367.

^k 2 Lil. P. R. 608. 1 Str. 696.

^l *Per Kenyon, arg.* Doug. 437. and see 1 Durnf. & East, 363.

^m 1 Barnard. K. B. 141. Barnes, 447. but see 1 Str. 479.

ⁿ 2 Salk. 648. Barnes, 447.

^o Say. Rep. 79. and see 2 Lil. P. R. 604.

^p 1 Barnard. K. B. 141.

^q *Doe ex dim. Angell v. Angell*, T. 36 Geo. III. K. B.

^r Barnes, 438. Cas. Pr. C. P. 103. Pr. Reg. 411. S. C.

^s Barnes, 447.

^t 1 Brod. & Bing. 265. 3 Moore, 582. S. C.

^u 1 Sid. 407.

^v 2 Salk. 651. 6 Mod. 123. S. C. but see 2 Lil. P. R. 608.

^w 12 Mod. 318.

prius costs, if he succeed, and if he fail, to pay bar costs.⁷ In *London*, it is said, a cause cannot be tried at bar, by reason of the charter of the citizens, which exempts them from serving upon juries out of the city.² And when the cause of action arises in a county *palatine*, it has been doubted whether the court can compel the inhabitants of the palatinate to attend as jurors.³

A trial at bar is never granted before issue joined,⁴ except in *ejectment*; in which, as issue is very seldom joined till the term is over, it would afterwards be too late to make the application.⁵ This sort of trial should regularly be moved for, in the term preceding that in which it is intended to be had, as in *Hilary for Easter*, and in *Trinity for Michaelmas* term;⁶ except where lands lie in *Middlesex*:⁷ and it is never allowed in an issuable term,⁸ unless the crown be concerned in interest,⁹ or under very particular and pressing circumstances.¹⁰ In *Easter* term, the court of King's Bench did not formerly allow more than *ten* trials at bar;¹¹ and they must have *been brought on a fortnight at least before the end of it,¹² to [*809] allow sufficient time for the other business of the court.

From what has been said it will be seen, that the courts are extremely unwilling to grant a trial at bar, except in cases where it appears to be absolutely necessary. And even where it is fit that a trial at bar should be granted, as it is a favour asked by the party applying for it, they will lay him under reasonable terms: And therefore, where the defendant in *ejectment* applied for a trial at bar, and it appeared that the lessor of the plaintiff was in such indigent circumstances, as not to be able to bear the expense, and that one of his witnesses was a woman above eighty years of age, who might die before a trial at bar could be had, the court of King's Bench required the defendant to consent, that if he succeeded, he should only have *nisi prius* costs; but that if the lessor of the plaintiff were to succeed, he should have bar costs: and that the old witness should be examined upon interrogatories, and her depositions read, if she should die before the trial.¹³ It was also, by consent, made part of the rule, that the cause should be tried by a *Middlesex* jury, instead of one from *Norfolk*, where the premises were situated.¹⁴

Formerly, there was no other notice given of such trial, in the

⁷ 2 Salk. 648. Doug. 437. but see 2 Barnard. K. B. 146.

² 2 Lil. P. R. 607. 2 Salk. 644. But note, the great cause of *Lockyer* against the *East India Company* was tried at bar, (M. 2 Geo. III.) by a special jury of merchants of *London*. 2 Salk. 644. 1 Durnf. & East, 366. In that case, however, the jury consented to be sworn, and waive their privilege. 2 Wils. 136.

³ Say. Rep. 47. and see 1 Durnf. and East, 363.

⁴ 2 Lil. P. R. 238. 608. 12 Mod. 331. 1 Str. 696. 2 Barnard. K. B. 125. 1 Durnf. & East, 364. *in notis*.

⁵ Say. Rep. 155. Barnes, 455.

⁶ 2 Lil. P. R. 603. 611. Cas. Pr. C. P. 66.

⁷ 2 Salk. 649.

⁸ Fitzgib. 267. *Per Buller*, J. in *Coleman v. City of London*, M. 21 Geo. III. K. B. Barnes, 447. 1 H. Blac. 211. C. P. But the case of *Goodtitle ex d.m. Herrell v. Braham* (4 Durnf. & East, 497. was tried at bar, in *Hilary* term, 32 Geo. III. K. B.

⁹ 2 Lil. P. R. 603. R. M. 4 Ann. (c). K. B. 1 Str. 52. *Rex v. Keene and others*, H. 26 Geo. III. K. B.

¹⁰ 2 Lil. P. R. 615. 1 Str. 52. 1 Barnard. K. B. 370.

¹¹ 2 Lil. P. R. 607.

¹² 2 Lil. P. R. 609.

¹³ Doug. 437.

¹⁴ *Id. ib. d.*

King's Bench, than the rule in the office;^a but now, it is said, there must be *fifteen* days notice.^o The plaintiff, however, as in other cases, may countermand his notice, and prevent the cause from being tried at the day appointed; after which, it cannot be brought to trial again, unless some new day be appointed by the court.^p And it is said, that a second rule cannot be made for a trial at bar, between the same parties in the same term.^q Previously to giving notice, the day appointed for the trial must be entered with the clerk of the papers, in the King's Bench,^r and before the trial, a copy of the issue must be left with him, in order that he may take four copies of it, which he delivers to the judges:^s and in that court, a trial at bar could not formerly have been on a *Saturday*,^t or the last paper-day in term, except in the king's case.^u In the Common Pleas, it is a rule, that the plaintiff's attorney must, before the essoin day of the term in which the cause is appointed to be tried, give notice to the [*810] chief prothonotary or his secondary, of the day of trial, that the same may be put down in the court book provided for that purpose; and in case of neglect, the cause shall not be tried that term, without motion, and the special direction of the court.^x And in that court, the chief-justice and rest of the judges shall respectively have copies of the issue in the cause delivered to them, *four* days before the time appointed for trial.^y

A trial at bar is had upon the *distringas* or *habeas corpora*, as at common law, without any clause of *nisi prius*: and it is mostly by a *special* jury of the county where the action is laid.^z *Six* days notice at least ought to be given to the jurors before the trial;^a and if a sufficient number do not attend to make a jury, the trial must be adjourned, and a *decem* or *octo tales* awarded, as at common law;^b for the parties in this case cannot pray a *tales* upon the statutes.^c And no writ of *alias* or *pluries distringas*, with a *tales*, for the trial of an issue at bar, shall be sued out before the precedent writ of *distringas*, with a panel of the names of the jurors annexed, shall be delivered to the secondary, to the intent that the issues forfeited by the jurors, for not appearing upon the precedent writ, may be duly estreated.^d On a trial at bar, in the King's Bench, it is the secondary's duty to call over and swear the jury, and record the verdict, whether taken in court, or in private after the court is adjourned; of the clerk of the rules, to mark all deeds and papers

^a Append. Chap. XXXIV. § 1.

^o Append. Chap. XXXIV. § 6. 2 Salk. 649. but see Imp. K. B. 391. where it is said, that now there must be the same notice of trials at bar as in other cases.

^p R. M. 4 Ann. (c). K. B. Imp. C. P. 392.

^q Fitzgib. 267.

^r 2 Lil. P. R. 608.

^s Imp. K. B. 391.

^t 2 Lil. P. R. 602.

^u 2 Salk. 625.

^x R. H. 9 Ann. reg. 1. C. P.

^y R. M. 3 Geo. II. reg. 1. C. P.

^z 2 Lil. P. R. 123. 1 Salk. 405. R. T. 8

W. III. K. B. 1 Bur. 292. but see Doug. 438. where the trial was had, by *consent*, by a jury of a different county; and in *W.les*, or *Berwick* upon *Tweed*, &c. or where an impartial trial cannot be had, the jury must come from the next *English* or adjoining county.

^a Bay. Rep. 30.

^b 5 Durnf. & East, 457, 8. 462.

^c 35 Hen. VIII. c. 6. 4 & 5 Ph. & M. c.

7. 5 El. c. 25. 14 El. c. 9. 7 & 8 W. III. c. 32. § 3.

^d R. H. 14 & 15 Car. II. K. B. 2 Lil. P. R. 123.

given in evidence, and to have the custody of them after the trial, till called for; and of the clerk of the papers, to read the record and the written evidence.^o In the Common Pleas, we have seen,^t it is the duty of the secondaries to copy the issues for the judges, and deliver four copies thereof; to call the jury, and defendant; to read the record and all written evidence, and to record the verdict.^s After a trial at bar, if either party be dissatisfied with the verdict, he may move for a new trial, as in other cases.^h

*Trials at *nisi prius* are always had in the county where [*811] the venue is laid, and where the fact was, or is supposed to have been committed;ⁱ except where the venue is laid in *Wales*, or *Berwick* upon *Tweed*,^k &c. or in a county where an impartial trial cannot be had, in which cases the cause shall be tried in the next *English* or *adjoining* county:^l and *Herefordshire* is considered as the next *English* county to *South Wales*, and *Shropshire* to *North Wales*.^m

Anciently, it seems, all causes in *Middlesex* were tried at bar: But this, from the increase of business, having been found extremely inconvenient, it was enacted by the statute 18 Eliz. c. 12. that "the chief justice of *England*, the chief justice of the Common Pleas, and the chief baron of the Exchequer, or in their absence two puisne judges of their respective courts, within term-time or *four days* next after the end of every term, might try in *Westminster hall*, all manner of issues which ought to be tried in any of the said courts, by an inquest of the said county of *Middlesex*: and that commissions and writs of *nisi prius* should be awarded in such cases, as had been used in any other shire of the realm." Two puisne judges were required to sit at *nisi prius* in *Middlesex*, in the absence of the chief justices or chief baron, till the statute 18 Geo. I. c. 31. by which it was provided, that any *one* judge of the several courts of record in *Westminster hall*, might try causes in the manner prescribed by 18 Eliz. c. 12; and the time was extended to the space of *eight days* after the end of every term. By a subsequent statute,ⁿ this time was still further extended to *fourteen days*. And, by the statute 1 Geo. IV. c. 55. § 1. causes may be tried in *Middlesex*, at any time during the vacation. Trials may also be had in that county, either in *Westminster hall*, or, with the consent of his Majesty, signified under his sign manual, in any other fit place in the city of *Westminster*.^o

^o From a *MS.* note, in the late Mr. *Card's* book at the Rule Office.

^t *Ante*, 40.

^s For the form of the entry of a verdict, on a trial at bar, in *K. B.* see *Append. Chap. XXXVII. § 1.*

^h *Sty. Rep.* 462. 466. 1 *P. Wms.* 212. 2 *Ld. Raym.* 1358. 1 *Str.* 584. *S. C.* 2 *Str.* 1105. 2 *Atk.* 320. 1 *Bur.* 395. *S. P.*

ⁱ 3 *Bur.* 1334.

^k 2 *Bur.* 859.

^l *Ante*, 780, 81, 2.

^m 2 *Maule & Sel.* 270. and see 11 *East*, 370.

ⁿ 24 *Geo. II. c.* 18. § 5.

^o *Stat. I. Geo. IV. c.* 21. And see the statute 3 *Geo. IV. c.* 87. for enabling his majesty's court of *Exchequer* to sit, and the lord chief baron or any other baron of the said court to try *Middlesex* issues, elsewhere than in the place where the court of *Exchequer* is commonly held in that county, during the period of rebuilding the said court.

In *London*, trials at *nisi prius* take place by immemorial custom, and the judges sit at *Guildhall*, when and as long as the exigency of business requires.^p And, by the statute 1 Geo. IV. c. 55. § 2. for giving further facilities to the proceedings in the court of King's Bench, "any one of the judges of that court is authorized, at the [*812] request of the chief justice, to sit for the trial of causes at *nisi prius* in *Westminster* and *London*, on the same days on which the said chief justice, or any other judge of the same court, in the absence of the said chief justice, shall be sitting, for the trial of causes at those places respectively, so that the trial of two causes may be proceeded in at the same time: and all jurors, witnesses, and other persons, who may have been summoned or required to attend, and who ought to attend, at or for the trial of any cause before the said chief justice, during the time aforesaid, shall give their attendance at and for the trial thereof, before such other judge as may be sitting for the trial thereof, by virtue of that act; and it shall and may be lawful to and for the marshal, and other officers of the said chief justice, to appoint from time to time fit and proper persons, to be approved by the said chief justice, to attend for them and on their behalf respectively, before such judge: Provided always, that all causes intended to be tried at any sittings at *nisi prius* in *Middlesex*, or *London*, shall be entered for trial with the marshal of the said chief justice, and all process and other proceedings, for or relating to the trial thereof, shall be made and issued according to the practice and forms now in use; but, nevertheless, the trial of every cause which shall be tried in virtue of that act, shall be entered of record, as having been had and made before the judge before whom such cause shall happen to have been actually tried."

In the King's Bench and Common Pleas, particular days are appointed by the chief justices, for the trial of causes in *London* and *Middlesex*, at the sittings in and after each term. In the Exchequer of Pleas, it is a rule, that "the sitting in *London* shall be holden at the *Guildhall* of the said city, on the second day next preceding the end of the term; and that the sitting for the county of *Middlesex* shall be holden in the court of Exchequer in *Westminster hall*, on the day next preceding the end of the term: and that the sitting in *London* after each term, shall be holden on the second day next after the end of the term: and the sitting after each term in *Middlesex*, shall be holden on the sixth day of the sitting next after the end of the term."^q And, by a late notice,^r the chief baron sits at *two* o'clock, instead of *six*, in *London* and *Middlesex*: In other respects, he sits at *nisi prius* as usual. The king, by his prerogative, may try his cause either at bar or *nisi prius*;^s and he may try it in what county he pleases.^t In practice, however, it is usually tried in the [*813] court of Exchequer, in *Middlesex*:^u *and, in that court, the first seven days of the sittings after the end of each term in *Mid*-

^p 3 Campb. 42. n.

^q R. E. 49 Geo. III. in *Seac. Man. Ex. Append.* 226. 8 Price, 507.

^r M. 54 Geo. III. in *Seac. Man. Ex. Append.* 227.

^s Sav. 2. Cro. Car. 348, 9.

^t West on *Exents*, 216.

dissex, are said to be appropriated to the trial of crown causes.* Issues directed by the court of Chancery are tried in the King's Bench, or Common Pleas: and issues from the Exchequer, on the law side of the same court.*

Previously to the sittings or assizes, at which the cause is intended to be tried, the plaintiff should give *due* notice of trial; and if he proceed to trial, without giving such notice, the verdict may be set aside for irregularity. Every notice of trial ought to be in writing;† and given to the defendant, if he appear in person, or otherwise to his attorney, if his place of abode be known;‡ but if the attorney's place of abode be unknown, the notice may be given to the defendant himself:§ And when the defendant is a prisoner, notice of trial may be given to the turnkey.¶ In country causes, the notice of trial, in the King's Bench, should be given to the agent in town;‡ but in the Common Pleas, it seems that it may be given either to the agent in town, or to the attorney in the country,‡ except where it is given on the back of the issue, in which case, as the issue must be delivered,‡ so the notice of trial must of necessity be given to the agent in town. In the Exchequer, all notices of trial given by the attornies or side clerks of the office of pleas, in causes instituted there, are required to be entered in the book of orders kept in such office, and a written notice of such entries left at the seat in the said office, of the attorney or clerk in court concerned for the defendant, or at his chambers or place of residence.†

In the King's Bench, upon the delivery of a paper book, wherein issue is joined, and notice of trial given, (as it may be,) on the back of the book, if the special pleadings be afterwards waived, and the general issue given, the notice which was given for the trial of the special issue, shall serve for notice of trial upon the general issue.‡ And, in the Common Pleas, in all cases where the plaintiff's pleading *concludes to the country, the defendant's [*814] attorney shall be bound to accept of notice of trial upon the back of such pleading, whether the same be delivered or left in the office; and such notice of trial shall be as good and effectual, as if issue had been actually joined.‡ So, in the Exchequer, it is a rule, that "in all cases where the plaintiff concludes to the country, his attorney or clerk in court may give notice of trial, at the time of delivering

* Edm. Excheq. 302. And for the business done at the sittings of the *outer* court of Exchequer in term, see Notice of 28 April, 1817. 4 Price, 21, 2. Man. Ex. Append. 298. 2 Chit. Rep. 382, 3.

‡ 2 Anstr. 493. 601. 1 Madd. Chan. 106.

† R. M. 4 Ann. (c.) K. B. Cas. Pr. C. P. 3.

‡ Say. Rep. 133. K. B. Cas. Pr. C. P. 62. Pr. Reg. 276. 396. 442. S. C. Barnes,

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306. S. P.

‡ *Id. ibid.*

‡ 1 Str. 248. *Ante*, 370.

‡ 3 East, 568.

‡ Barnes, 306. but see *id.* 298. Cas. Pr. C. P. 120, S. C. *semb. contra.*

‡ Cas. Pr. C. P. 94.

‡ R. H. 39 Geo. III. in *Seac. Man. Ex. Append.* 223, 4. 8 Price, 503. *Ante*, 505.

‡ R. H. 8 Geo. I. (a.) K. B.

‡ R. T. 2 Geo. I. C. P.

his replication or other subsequent pleading, in case issue shall be joined thereon, or of executing a writ of inquiry, in default of joining issue ; which shall be deemed good notice of trial, from the time of the delivery of such replication or other subsequent pleading, in case issue shall be joined."¹

Notice of trial may be, and is usually given on the back of the issue or paper book, in the King's Bench ; or it may be given on a separate paper.^k In the former case, it need not be so particular as in the latter : and therefore, where the issue was indorsed as follows, "Take notice of trial at the next assizes," this was holden to be a sufficient notice, without any mention of the date, county, or attorney's name ; though it would have been otherwise, if given on a separate paper.^l And, in the Common Pleas, the continuance of a void notice of trial may operate as a new notice, if given in regular time.^m When there are several defendants, and one of them pleads, and the other lets judgment go by default, the notice should express that the issue joined with the former will be tried, and that the jury will at the same time assess the damages against the latter.ⁿ

If the venue be laid in *London* or *Middlesex*, and the defendant live within forty *computed*^o miles of *London*, there must be *eight* days notice of trial, exclusive of the day it is given, but inclusive of that on which the trial is to be had ; and if the defendant live above forty computed miles from *London*, then *fourteen* days notice must be given.^p And it is a rule in both courts, that "in every notice of trial to be given for the sittings after any term, to be holden at the *Guildhall* of the city of *London*, it shall be specified whether the cause is intended to be tried at the first day of such sittings, or at the adjournment day ; and that in every case in which such notice shall specify that the cause is to be tried at the adjournment day, it shall be sufficient to give such notice *eight* days before the first day of the sittings after term, if the defendant or defendant[s] reside above *forty* *miles from the said city of *London*, and *four* days before the said first day, if the defendant or defendant[s] reside within that distance."^q In the Exchequer, by a late rule,^r "all notices of trial, in causes on the plea side of this court, for the sittings after term in *London* and *Middlesex*, shall, in case the defendant or defendant[s] reside at a less distance from the cities of *London* or *Westminster* than *forty* miles, be given *eight* days before the day appointed by the lord chief baron, for the trial of the same causes ; and in case the defendant or defendant[s] reside *forty* miles or upwards therefrom, then such notices of trial shall be given *fourteen* days before such day appointed by the lord chief

¹ R. T. 26 & 27 Geo. II. § 4. in *Scac.*
Man. Ex. Append. 211.

^k Append. Chap. XXXIV. § 2, &c.

^l 2 Str. 1237.

^m 2 Blac. Rep. 1298. and see Barnes,
292. Pr. Reg. 396. S. C.

ⁿ Append. Chap. XXXIV. § 5.

^o 2 Str. 954. 1216.

^p R. M. 4 Ann. (c.) K. B. R. M. 1654.
§ 21. C. P.

^q R. E. 51 Geo. III. K. B. 13 East, 593.
2 Campb. *Introd.* XII. R. H. 32 Geo. III.
C. P.

^r R. E. 56 Geo. III. in *Scac.* Man. Ex.
Append. 227. 4 Price, 4.

baron as aforesaid ; one day being considered inclusive, and the other exclusive."

In *country* causes, *eight* days notice of trial seems to have been formerly sufficient ;^a but now, by statute 14 Geo. II. c. 17. § 4. "where the defendant resides above *forty* miles from town, no cause shall be tried at *nisi prius*, either at the assizes or sittings in *London* or *Westminster*, unless notice of trial in writing has been given, at least *ten* days before such intended trial :"^b and hence *ten* days notice of trial is required, in all cases, at the *assizes*. But as this statute has no negative words, it is still necessary to give *fourteen* days notice of trial for the sittings in *London* or *Westminster*, where the defendant lives above *forty* computed miles from *London*.^c And when a defendant, residing in town at the issuing of the writ changes his residence permanently to the country, at the distance of above *forty* miles from town, before the delivery of the issue, he is entitled to *fourteen* days notice of trial.^d And the like notice is required, when the defendant usually resides *abroad*, and has no settled habitation in this country ;^e or where his place of abode is above *forty* miles from *London*, though he may happen to be there at the time of the arrest, or notice of trial.^f But when the defendant being a practising attorney, has chambers in one of the inns of court, and a house above *forty* miles from *London*,^g or when he has a permanent residence in town, from which his absence is merely occasional or temporary,^h *eight* days notice of trial is sufficient : *which also seems to be the case, when there [*816] are several defendants, and one of them resides within *forty* miles of *London*.ⁱ So, in the Exchequer, it is a rule,^j that "in all cases where the venue is laid in the country, and a term's notice is not necessary, *ten* days notice of trial, exclusive of the day it is given, shall be deemed sufficient notice ; but if the venue be laid in *London* or *Middlesex*, and the defendant reside above *forty* miles from *London*, then the plaintiff shall give *fourteen* days notice of trial, exclusive of the day it is given, unless a baron shall think fit to order otherwise."

Upon an *old* issue, or, in other words, when there have been no proceedings for *four* terms exclusive,^k or, as it seems, (in the King's Bench,) for a *year*^l after issue joined, a term's notice of the plaintiff's intention to proceed, is requisite ; which notice must be given before the *essoin* day of the *fifth*, or other subsequent term :^m

^a R. M. 1654. § 21. C. P.

^b Notice of trial on the 9th, for the 19th has been deemed sufficient, under this statute. *Legge v. Williams*, M. 23 Geo. III. K. B.

^c *Barney*, 305. and see Pr. Reg. 388. 2 Blac. Rep. 1205.

^d 1 East, 688.

^e Pr. Reg. 388. 2 Blac. Rep. 1205. 4 Durnf. & East, 552.

^f Pr. Reg. 387.

^g *Id. ibid.*

^h 2 Price, 279. and see 2 Blac. Rep. 992.

ⁱ *Per Ashhurst*, J. 4 Durnf. & East, 520.

^j R. H. 16 Geo. III. in *Scac. Man. Ex. Append.* 220.

^k 2 Salk. 457. 645. 653. R. M. 4 Ann. (c.) K. B. R. E. 13 Geo. II. C. P. R. T. 26 & 27 Geo. II. § 5. in *Scac. Man. Ex. Append.* 211. 12. and see *Append. Chap. XXXIV. § 7.*

^l 2 Salk. 645. 1 Str. 537. Imp. K. B. 8 Ed. 359. & see R. M. 1654. § 21. C. P. 3 Maule & Sel. 500. 1 Chit. Rep. 669. (a.)

^m 1 Str. 211. 2 Str. 1164. K. B. Pr. Reg. 391. *Barnes*, 291. S. C. R. E. 13 Geo. II. C. P. R. T. 26 & 27 Geo. II. § 5. in *Scac. Man. Ex. Append.* 311, 12.

And a judge's or baron's summons, if no order has been made upon it, is not a proceeding within the meaning of this rule;^b nor the suing out of a *venire facias* or *distringas*, in the vacation of the fourth term, though it be tested and entered as of that term:^c But a judge's order, or notice of trial, though countermanded,^d or notice that the plaintiff will proceed in the cause, which has not been acted under, is such a proceeding as will prevent the necessity of giving a term's notice.^e The rule requiring a term's notice does not extend to a trial by *proviso*,^m or a motion for judgment as in case of a nonsuit;ⁿ and being confined to *voluntary* delays, it does not apply, when the cause has been stayed by *injunction* or *privilege*;^o or when there has been an agreement to stay proceedings for a limited time, to enable the defendant to pay the debt, in default of which the plaintiff is to be at liberty to proceed.^p Short notice of trial, in country causes, must be given *four* days at least before the [*817] commission day, one exclusive and the other *inclusive;^q In town causes, *two* days notice seems to be sufficient;^r but it is usual to give as much more as the time will admit of: and if the defendant be under terms to take short notice of trial for the last sittings *in* term, and no notice be given for those sittings, he is not obliged to take short notice for the sittings *after* term.^s So, in the Common Pleas, an undertaking to accept short notice of trial for the sittings after term, given when there is not time for short notice of trial at the sittings, does not compel the defendant to accept short notice of trial at the adjourned sittings.^t *Sunday* is to be accounted a day in these notices, unless it be the day on which the notice is given.^u

If the plaintiff be not ready to proceed to trial pursuant to notice, he may *countermand*, or in some cases *continue* it. Notice of countermand, like notice of trial, ought to be in writing;^x and may be given to the attorney in the country, as well as the agent in town.^y Before the statute 14 Geo. II. c. 17. *two* days notice of countermand appears to have been sufficient in all cases, unless it was for a trial at the assizes, and the countermand was given to the agent in town; in which case it was required to be given *four* days before the commission day.^z But now, by that statute, § 5. the countermand of notice of trial at the assizes, or in a town cause where the defendant lives above *forty* miles from *London*, must be given *six*

^a R. E. 13 Geo. II. C. P.

^b 2 Salk. 457. 650.

^c Pr. Reg. 391. 2 Barnes, 304. S. C.

R. E. 13 Geo. II. C. P. 1 Str. 531. R. T.

26 & 27 Geo. II. § 5. in *Soaz* Man. Ex.

Append. 211, 12.

^d 3 East, 1.

^e 2 Barn. & Ald. 594. 1 Chit. Rep. 317.

S. C.

^f *Id. ibid.* 5 Durnf. & East, 634. Barnes, 308. 2 Blac. Rep. 1223.

^g 1 Sid. 92. R. M. 4 Ann. (c.) K. B. Doug. 71. 2 Blac. Rep. 784.

^h 2 Bur. 660. 2 Blac. Rep. 762.

ⁱ R. E. 30 Geo. III. K. B. 3 Durnf. &

East, 660.

^j Pr. Reg. 390. 444. Barnes, 301. S. C.

^k *Isaacs v. Windsor*, T. 24 Geo. III. K. B.

B.

^l 7 Taunt. 452. 1 Moore, 160. S. C.

^m R. M. 4 Ann. (c.) K. B. 8 Mod. 21. and see R. M. 3 Geo. I. C. P. Cas. Pr. C. P. 15.

ⁿ *Id. ibid.* Cas. Pr. C. P. 3.

^o 2 Str. 1073. Cas. Pr. C. P. 48, 9. 120. Pr. Reg. 393. Barnes, 298. S. C. *Id.* 306.

and see Append. Chap. XXXIV. § 9.

^p R. M. 4 Ann. (c.) K. B. 2 Str. 849. 1073. and see R. M. 1654. § 21. (a.) R. M. 3 Geo. I. C. P. Barnes, 298. 305.

days at least before the intended trial: In other cases, *two* days notice of countermand is still sufficient, the day of countermand being one, exclusive of the commission day, or day of sittings. In the Common Pleas, notice of trial cannot be given or countermanded on a *Sunday*,^a but it seems that before the statute, where the commission day was on *Monday*, notice of trial might have been countermanded on the *Saturday* preceding:^b and in that court, notice of trial may be countermanded, though the record be made a *remanet*.^c In the Exchequer, *six* days notice of countermand, exclusive of the day it is given, is deemed sufficient notice in all cases, where the venue is laid in the country, unless where a defendant is obliged to take short notice of trial.^d

*If the plaintiff give notice of trial, and proceed not accord- [*818] ingly, he cannot in general take the cause down to trial again, without new notice, to be given as before, unless by consent or rule of court.^e But if notice of trial be given for a day certain in *London or Middlesex*, and the plaintiff be not ready to proceed, the cause may be tried at the next sitting,^f upon giving *two* days previous notice, one inclusive and the other exclusive; which is called a notice of trial by *continuance*.^g So, if the defendant enter a *ne recipiatur*, and by that means hinder the plaintiff from trying his cause at one sitting, the plaintiff may proceed to trial at the next, upon notice given before the rising of the court at the first sitting.^h But the plaintiff cannot continue his notice of trial, more than once in a term.ⁱ And, in the Common Pleas, the plaintiff cannot *countermand* and *continue* in the same notice.^k If the cause be not tried, after it is continued, at the next sitting, notice is to be given as at first, unless it be made a *remanet*; and then new notice of trial is never given, for the defendant is bound to attend till the cause be tried.^l And where a cause is made a *remanet* to the next sittings, by an order of *nisi prius*, no fresh notice of trial is requisite.^m But if the trial be put off by rule of court, there must be a fresh notice of trial.ⁿ And even where the plaintiff gives a peremptory undertaking, to try at the next sittings or assizes, there also a new notice of trial must be given; because notwithstanding such undertaking, the plaintiff may decline trying his cause.^o When a cause is made a *remanet*, the costs of the first sittings or assizes abide the event of the trial.^p

If the plaintiff do not proceed to trial pursuant to notice, or countermand in time, the defendant, on a proper affidavit,^q shall be

^a R. M. 3 Geo. 1. C. P. Cas. Pr. C. P. S. C.

15. ^b Barnes, 301. Pr. Reg. 395. S. C.

^c Pr. Reg. 393.

^d R. H. 16 Geo. III. in *Scac. Man. Ex.* Append. 220.

^e R. M. 1654. § 18. K. B. R. M. 1654. § 21. C. P.

^f R. M. 4 Ann. (c). K. B. R. M. 1654.

§ 21. Barnes, 301. C. P.

^g Append. Chap. XXXIV. § 8.

^h R. M. 4 Ann. K. B. 2 Salk. 653.

ⁱ 2 Str. 1119. Barnes, 292. Pr. Reg. 395.

^k Barnes, 301. Pr. Reg. 394. S. C.

^l R. M. 4 Ann. (c). K. B. 8 Durnf. & East, 245, 6. but see the case of *Hicks v. Strutt*, E. 27 Geo. III. K. B. *semb. contra*.

^m 1 Dowl. & Ry. 15.

ⁿ 8 Durnf. & East, 245, 6. K. B. 2 Blac. Rep. 798. C. P.

^o *Id. ibid. Monk v. Wade*, T. 29 Geo.

III. K. B. 1 H. Blac. 222. C. P.

^p Say. Rep. 272. 1 Kenyon, 338. S. C.

Id. 341. 4 Bur. 1988.

^q Append. Chap. XXXIV. § 10, 11.

allowed his costs of the day;⁷ and if they are not paid, he may, on an affidavit of demand and refusal,⁸ have an attachment: or, after the issue is entered, he may proceed to trial by *proviso*, as at common law, or move the court for judgment as in case of a nonsuit, upon [*819] the statute *14 Geo. II. c. 17. The motion for costs, for not proceeding to trial, is a motion of course, in the King's Bench, requiring only counsel's signature. And the practice of allowing costs in that court, extends to *criminal* as well as *civil* cases: Therefore, upon an indictment for perjury, removed into that court by *certiorari*, if the prosecutor give notice of trial to the defendant, and withdraw the record, without countermanding his notice in time, he shall pay costs to the defendant:⁹ And the prosecutor of an information in nature of a *quo warranto* shall pay costs, for not proceeding to trial pursuant to notice.¹⁰ In the Common Pleas, it is said, the prothonotary may tax costs for not going on to trial, at his discretion.¹¹ For this purpose, a side-bar or treasury rule may be obtained: and where both the plaintiff and defendant gave notice, but neither of them went on to trial, it was holden that they were both entitled to costs.¹² So, costs were allowed for not going on to trial, though the defendant had entered a *ne recipiatur*:¹³ and they are payable in that court, as well as in the King's Bench, where the cause goes off for want of jurors, neither side having prayed a *tales*.¹⁴ A *pauper* must pay costs, in the Common Pleas, for not proceeding to trial pursuant to notice;¹⁵ but in the King's Bench, we have seen,¹⁶ they will not make any rule about costs, until he be dispaupered: And an *executor* is not liable to pay costs, for not proceeding to trial, unless he has been guilty of a wilful default.¹⁷

In the King's Bench, the defendant may move for costs for not proceeding to trial, and afterwards for judgment as in case of a nonsuit; for it is a rule in that court, not to give costs, unless a separate motion be made for them:¹⁸ But he cannot move for judgment as in case of a nonsuit, and costs for not proceeding to trial, at the same time;¹⁹ nor, after moving for the former, is he allowed to apply for the latter.²⁰ In the Common Pleas, a defendant who moves for costs for not proceeding to trial, cannot have judgment as in case of a nonsuit, for the same default, either in the same or a subsequent term;²¹ though it seems he may have such judgment, after the issue

⁷ R. M. 1654. § 18. R. M. 4 Ann. (c).
K. B. R. M. 1654. § 21. C. P.

⁸ Append. Chap. XL. § 8. In the Common Pleas, the demand of costs must be made at the same time the rule is served.
Barnes, 120.

⁹ 8 East, 269.

¹⁰ 1 Str. 33. Say. Rep. 130.

¹¹ Fr. Reg. 404.

¹² *Id.* 405.

¹³ *Id.* 406. Cas. Pr. C. P. 60. S. C.

¹⁴ 2 Wils. 366.

¹⁵ Fr. Reg. 405. Cas. Pr. C. P. 47. S. C.

¹⁶ *Ante*, *113.

¹⁷ Barnes, 133. and see Cas. Pr. C. P. 157, 8. P. R. Reg. 119. S. C.

¹⁸ *Triand v. Goldsmith* & another, 1 Bos. & Pul. 39. (a). and see 1 Price, 61, 2. 7 Taunt. 476. 1 Moore, 251. S. C.

¹⁹ *Earl of Leicester v. Wooden*, M. 21 Geo. II. K. B.

²⁰ *Hullock on Costs*, 404. *Cooke* and others, executors, v. *Lucas*, T. 42 Geo. III K. B. accord.†

²¹ Barnes, 316. 4 Taunt. 591. accord. 2 New Rep. C. P. 247. *contra*. and see 2 Price, 90, 91.

is entered, for a *subsequent default:¹ And, after moving for [*820] judgment as in case of a nonsuit, he is not allowed to move for costs for not proceeding to trial.² The defendant therefore, in that court, must make his election, either to move for costs for not proceeding to trial, or for judgment as in case of a nonsuit: and in practice it is usual for him to move for the latter; upon which, if the court, on shewing cause, grant further time to the plaintiff, it is generally on the condition of his paying costs for not proceeding to trial.¹ In the Exchequer, as in the King's Bench, the defendant may move for costs for not proceeding to trial, and afterwards for judgment as in case of a nonsuit.³ But the application for costs for not proceeding to trial, and for deducting the amount of them when taxed from the damages ultimately recovered by the plaintiff, cannot in that court be made by one motion.⁴ On the taxation of costs, for not proceeding to trial pursuant to notice, the court held that the master ought to have allowed the expenses of a witness brought up from *Newcastle upon Tyne to London*, to give evidence by comparison of hand writing, in a cause where the defence was forgery; without agitating the question, whether the evidence were or were not admissible.⁵

The trial by *proviso* is so called, from a clause in the *distringas*, which provides, that "if two writs come to the sheriff, he shall only execute and return one of them:"⁶ And if both the plaintiff and defendant happen to carry down the record at the same time, the trial shall be by the plaintiff's record, if he enter it with the marshal; but if he do not enter it, the defendant may proceed on *his* record.⁷ This rule, however, applies only to cases where both the plaintiff's and defendant's records are carried down in a triable shape: Therefore, where the plaintiff, having omitted to give due notice of trial, entered his record in the marshal's book, subsequent to the entry of the defendant's record by *proviso*, upon which due notice of trial had been given; it was holden, that the defendant had a right to go to trial on his record, and that the plaintiff, not having then appeared, was properly nonsuited.⁸ The trial by *proviso* cannot be had in civil actions, till there has been some laches or default in the plaintiff, in not proceeding to trial, after issue joined; except in cases where the defendant is considered as an actor, as in *replevin*, *prohibition*, and *quare impedit*, which are to have a return, consultation, and writ to *the bishop:⁹ And the rule applies equally [*821] to cases where there has been a former trial, as to other cases.¹⁰ In the King's Bench, no trial can be had by *proviso* in *London* or *Middle-*

¹ 4 Taunt. 591.

² *Id.* 7 Taunt. 476. 1 Moore, 251. S. C.

³ 2 H. Blac. 280. 1 Bos. & Pul. 38. 4 Taunt. 592. (a). but see 5 Taunt. 88. 7 Taunt. 476. 1 Moore, 251. S. C.

⁴ Wightw. 65. 1 Price, 61. 2 Price, 90.

⁵ 1 Price, 375.

⁶ 1 Dowl. & Ry. 165.

⁷ 2 Lil. P. R. 612. 617. 2 East, 206. (a).

⁸ R. M. 4 Ann. (c). K. B.

⁹ 1 Barn. & Ald. 253.

¹⁰ 2 Salk. 652. R. M. 4 Ann. (c). K. B. R. M. 1654. § 21. C. P. 5 Taunt. 577. 1 Marsh. 218. S. C. 1 Chit. Rep. 226. but see 4 Durnf. & East, 767. where the court permitted a defendant to carry the record of an issue, directed by the court of Chancery, down to trial at the next assizes, on a suggestion that the plaintiff intended to delay it: and see 5 Moore, 473.

¹¹ 5 Taunt. 577. 1 Marsh. 218. S. C. 1 Chit. Rep. 226.

sex, till default made by the plaintiff, after the issue is entered on record; nor, in country causes, till the plaintiff hath made default in trying his issue the next assizes after it is entered.^a In the Common Pleas, if no notice of trial be given, the defendant cannot try the cause by *proviso* the same term, in *London* or *Middlesex*; but afterwards he may take it by *proviso*, according to law;^x and where notice of trial has been given, it is not necessary that a whole term should intervene before the cause is tried by *proviso*; but it may be so tried, in the next term after the notice of trial.^y In criminal cases, the defendant is not allowed to carry down the record to trial by *proviso*; because no laches can be imputed to the king.^z But, on indictments of treason or felony, if the attorney general will delay, the court of King's Bench may give the defendant leave to bring on the trial, as they see fit.^a So, on indictments for misdemeanors, the defendant may, in the first instance, by consent of the prosecutor, and leave of the attorney general, carry down the cause to trial: but it shall not be allowed by surprise on the attorney general, nor without consent of the prosecutor, or some default in him:^a And it is a rule, that when an indictment is removed into the King's Bench by the prosecutor, the defendant shall not carry it down to trial, without leave of the court on motion.^b On an information in the Exchequer, though the defendant cannot have a trial by *proviso*, yet it seems the recognizance of bail may be vacated, where the attorney general has not taken any effectual proceeding for three successive terms.^c

Before the defendant can have a trial by *proviso*, the issue must be entered on record: and therefore, unless this be done, the defendant should obtain a rule from the master, which is entered with the clerk of the rules in the King's Bench, or a side-bar or treasury rule from the secondaries in the Common Pleas, for the plaintiff to [*822] enter the issue; and if it be not entered, he may sign a **non pros*.^d If it be, and the plaintiff has been guilty of laches, the defendant in the King's Bench, may procure a rule from the master, for a trial by *proviso*;^e which must be entered with the clerk of the rules; and may be had, after giving notice of trial:^f In the Common Pleas, a rule for this purpose is not necessary.^g The defendant must give the like notice to the plaintiff of a trial by *proviso*, as the plaintiff would have been obliged to give to him:^h except that a term's notice is not required, after the lapse of four terms:ⁱ and if he do not proceed to trial according to notice, or countermand in

^a R. M. 4 Ann. (c). K. B. 1 Chit. Rep. 226.

^x R. M. 1654. § 21. C. P.

^y Burnes, 295. Cas. Pr. C. P. 101. Pr. Reg. 397. S. C.

^z 2 Salk. 652. 6 Mod. 247. Willes, 535.

^a Durnf. & East, 661. 2 East, 202.

^b 2 Salk. 652.

^c *Id.* 653. and see 5 Barn. and Ald. 728.

^d 7 Price, 557.

^e 2 Lil. P. R. 84. 87. 612. 615. 617. 3

Salk. 362, 3. R. M. 4 Ann. (c). K. B. Barnes, 313. C. P.

^f 2 Str. 1055. Append. Chap. XXXIV.

^g § 12.

^h 1 Durnf. & East, 695.

ⁱ Imp. C. P. 6 Ed. 323. (a).

^a R. M. 1651. R. M. 4 Ann. (c). K. B.

R. M. 1654. § 21. C. P. Barnes, 299. Cas.

Pr. C. P. 124, 5. Pr. Reg. 388. S. C.

^b 2 Barn. & Ald. 594. 1 Chit. Rep. 317.

S. C. *Ante*, 816.

time, the plaintiff shall have his costs.^k When the record is carried down by the defendant, and the issue happens to be upon the plaintiff, who is therefore to begin first, but he does not appear, the defendant must not enter upon his proof, and take a verdict; but the proper course is to call the plaintiff, and nonsuit him.^l

The delay and expense attending the trial by *proviso*, gave rise to the statute 14 Geo. II. c. 17. by which it is enacted, that "where any issue is or shall be joined, in any action or suit at law, in any of his majesty's courts of record at *Westminster*, &c. and the plaintiff or plaintiffs in any such action or suit hath or have neglected, or shall neglect, to bring such issue on to be tried, according to the course and practice of the said courts respectively, it shall and may be lawful for the judge or judges of the said courts respectively, at any time after such neglect, upon motion made in open court, (due notice having been given thereof,) to give the like judgment for the defendant or defendants in every such action or suit, as in cases of nonsuit; unless the said judge or judges shall, upon just cause and reasonable terms, allow any further time for the trial of such issue: And if the plaintiff or plaintiffs shall neglect to try such issue, within the time so allowed, then and in every such case, the said judge or judges shall proceed to give such judgment as aforesaid: Provided always, that all judgments given by virtue of this act, shall be of the like force and effect, as judgments upon nonsuit, and of no other force or effect: Provided also, that the defendant or defendants shall, upon such judgment, be awarded his, her or their costs, in any action or suit, where he, *she or they would [*823] upon nonsuit be entitled to the same, and in no other action or suit whatsoever."

This statute has been holden to extend to actions brought by *executors or administrators*,^m and to *qui tam* actions,ⁿ as well as others; and also to the traverse of the return to a *mandamus*.^o And, in the Common Pleas, judgment as in case of a nonsuit may be entered up against the demandant in a writ of right; nor will the court relieve him, if he has conducted himself unfairly towards the tenant, in the course of the proceedings.^p But the statute does not extend to actions of *replevin*,^q &c. in which the defendant is considered as an actor, and may therefore enter the issue, and carry down the cause to trial himself: And when there are two defendants, one of whom lets judgment go by default, the other cannot have judgment as in case of nonsuit.^r When the plaintiff withdraws his record, after

^k R. M. 4 Ann. (c.) K. B. 2 Str. 797. Pr. Reg. 405, 6. And see further, as to trial by *proviso*, 2 Saund. 336. (4.)

^l 2 Saund. 336. (b.)

^m Willes, 316. Barnes, 130. S. C. But they are not subject to costs. *Id. ibid.* 2 H. Blac. 277. *Post*, 830.

ⁿ Barnes, 315. 1 Wils. 325. Say. Rep. 22. S. C. 7 Durnf. & East, 178. 1 East, 554.

^o Say. Rep. 110. Say. Costs, 166. S. C. 4 Durnf. & East, 689.

^p 1 Bos. & Pul. 103.

^q 1 Blac. Rep. 375. Say. Costs, 168. S. C. 3 Durnf. & East, 662. 5 Durnf. & East, 400. *Per Cur. M.* 33 Geo. III. C. P. Imp. C. P. 389. but see Barnes, 317. *sembl. contra.*

^r Say. Rep. 22. Say. Costs, 163. 1 Wils.

† The cases in support of this rule have all been lately overturned, as 'not founded upon any principle,' and the practice established in the K. B. that, after judgment
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entering the cause for trial, the defendant, in the King's Bench, may have judgment as in case of a nonsuit.^a And where a cause was set down for the sittings in term, and made a *remanet* to the sittings after term by consent, the defendant may move for judgment as in case of a nonsuit, if the plaintiff afterwards withdraw the record.¹ But when a plaintiff in several causes perceives, by the event of one verdict, that he cannot have a fair trial in the others, he may withdraw his records in the other causes, without subjecting himself to judgment as in case of a nonsuit, or to the defendant's costs of the day of trial, upon the rule for such judgment being discharged.² So, where a special jury cause had been set down for trial, and standing in the paper for *three* years, without any appointment being applied for to have it tried, the court refused to give the defendant judgment as in case of a nonsuit.³ The proper course would have been, for the defendant to have applied to the chief-justice, to have the cause appointed for trial.⁴ And when the cause has been once carried [⁸²⁴] down to trial, and made a *remanet* at the assizes,⁵ or *the plaintiff has been nonsuited,⁶ or obtained a verdict,⁷ after which a new trial has been granted, the defendant cannot have judgment as in case of a nonsuit, for not carrying down the cause again; but must try the cause by *proviso*. Where the judge had refused to try an action upon a wager, depending on an abstract question of law or judicial practice, the court of King's Bench would not afterwards grant a rule for judgment as in case of a nonsuit; there having been no default of the plaintiff, in not proceeding to trial.⁸ And the court of Common Pleas will not entertain a motion for such judgment, pending a demurrer.⁹

The *course* and *practice* of the court, referred to by the statute, is that which before regulated the trial by *proviso*; and as the defendant could not have had such trial, until after the issue was entered of record,⁴ and the plaintiff had been guilty of laches,⁵ so neither till then is he entitled to judgment as in case of a nonsuit.⁶ If the action be laid in *London* or *Middlesex*, the defendant, we have seen,⁵ ought not to give a rule for the plaintiff to enter his issue the same term in which it is joined, unless notice of trial hath been given: And accordingly it is holden, that in *town* causes, unless

325. S. C. Say. Rep. 103. Say. Costs, 164.
S. C. 1 Bur. 358. Say. Costs, 168. S. C.
Cowp. 483. 3 Durnf. & East, 662. *Gosse*
v. Maccauley and others, T. 42 Geo. III.
K. B.

^a *Read v. Stone*, E. 36 Geo. III. K. B. 1
East, 346. 1 H. Blac. 280.

¹ 2 Barn. & Ald. 709.

² 5 Taunt. 88.

³ 2 Chit. Rep. 243.

⁴ 3 Durnf. & East, 1.

⁵ 1 Durnf. & East, 492. 1 Chit. Rep. 310.

⁶ *Hartley v. Thomson*, E. 22 Geo. III.

K. B. 1 H. Blac. 101.

^b 12 East, 247.

^c 2 Marsh. 364. and see 6 Moore, 488.

^d *Ante*, 821.

^e *Ante*, 820. For the time within which issues must have been formerly tried, see R. H. 15, 16 *Car. II. reg.* 2. R. H. 20, 21 *Car. II. R. M.* 4 Ann. (c). K. B. R. M. 1654. § 21. C. P. Barnes, 295. Cas. Pr. C. P. 101. Pr. Reg. 397. S. C.

^f Barnes, 313.

^g *Ante*, 785.

by default against one of two defendants, the plaintiff may, upon the trial of an issue joined by the other defendant, elect to be nonsuited. 5 *Barn. & Cres.* 178. 7 *Dowl. & Ry.* 619. S. C.

notice of trial has been given, the defendant cannot move for judgment as in case of a nonsuit, the next term after that in which issue was joined, although it was joined early enough to enable the plaintiff to give notice of trial for the sittings after the preceding term;^a the plaintiff, in such case, having the whole of the next term to enter the issue, and no laches can be imputed to him till the term after: And, in the King's Bench, where issue was joined in *Easter* term, and notice of trial given for the first sittings in *Trinity*, and the plaintiff having *continued* it till the sittings after that term, the defendant in the same term moved for judgment as in case of a nonsuit, it was refused by the court.ⁱ But if notice of trial has been given in a *town* cause, for a sitting in or after term, the defendant, in either court, may move for judgment as in case of a nonsuit the next term, being the term after that in which the issue ought to have been entered.^k To support a rule for judgment as in case of a nonsuit, in the next term after that "in which issue was joined, [*825] the affidavit must state that notice of trial was given for a sitting in or after the preceding term ;^l but in the third or other subsequent term, a general affidavit, stating the term when issue was joined, is deemed sufficient.^m In a *country* cause, where notice of trial is given for the assizes, the defendant may move for judgment as in case of a nonsuit the next term :ⁿ But the plaintiff is not bound to give notice of trial, till the term succeeding that in which issue was joined ;^o and if he do not, the defendant cannot move for judgment as in case of a nonsuit, till after the next assizes.^p In an *issuable* term, the rule for judgment as in case of a nonsuit, in a *country* cause, should be applied for early in the term, in order that the plaintiff may have sufficient time to shew cause in the same term; or the court, we have seen,^q will enlarge the rule till the next term, and not permit the parties to discuss it at chambers.

In the Common Pleas, it was decided in one case,^r that the defendant in a *town* cause was entitled to judgment as in case of a nonsuit, the next term after that in which issue was joined, if there was time enough to give notice of trial, though it was not actually given, for the sittings in or after the preceding term : But this decision seems to have been over-ruled by subsequent cases, in one of which it was determined, that the plaintiff has the whole of the term next after that in which issue is joined, to try his cause;^s and in another, the court said that the practice was now settled, that the

^a *Per Buller*, J. H. 30 Geo. III. K. B. 4 Durnf. & East, 557. R. M. 1654. § 21. C. P.

ⁱ *Fitzgerald v. Smith*, T. 36 Geo. III. K. B.

^k 2 Chit. Rep. 244. K. B. *Harman v. Gilbert*, M. 36 Geo. III. C. P. 2 New Rep. C. P. 397. and see *Barnes*, 295. Cas. Pr. C. P. 101. Pr. Reg. 397. S. C.

^l *Append. Chap. XXXIV. § 14.*

^m *Id. ibid.* and see 1 H. Blac. 282. 2 H. Blac. 558.

ⁿ *Imp. K. B. 9 Ed. 389. Imp. C. P. 6 Ed. 328, 9.*

^o 2 Durnf. & East, 734.

^p *Sed quare*, whether judgment as in case of a nonsuit cannot be moved for the next term after the *first* assizes, where issue is entered the same term in which it is joined, though notice of trial has not been given ; as it seems from a note on R. M. 4 Ann. K. B. that the defendant in such case may proceed to trial by *proviso*, at the *second* assizes.

^q *Ante*, 508.

^r 1 H. Blac. 65.

^s *Id.* 123.

defendant could not apply for judgment as in case of a nonsuit, before the *third* term :^a and though the plaintiff in that case was too late to try in the term in which the application was made, they would now punish a default before it was actually committed. In the Exchequer, the defendant may move for judgment as in case of a nonsuit, the next term after that in which issue was joined, if joined early enough to enable the plaintiff to give notice of trial for the sitting in or after the preceding term : a plaintiff, in this court, being in all cases bound to proceed to trial at the next sitting or assizes after issue joined, provided there be time for giving notice of trial.^u

[*826] When the plaintiff has neglected to try his cause, according to the course and practice of the court, the defendant is at liberty to move for judgment as in case of a nonsuit, the same term in which the issue is entered, in the King's Bench,^v as well as in the Common Pleas.^w The rule for judgment in such case, is a rule to shew cause,^x founded on an affidavit of the state of the proceedings, and of the plaintiff's default in not proceeding to trial ;^y which rule, in the King's Bench, has been holden to be sufficient notice of motion within the act :^b but, in the Common Pleas, it is otherwise ;^c and in that court, although notice has been given of a motion for judgment as in case of a nonsuit, on which the plaintiff entered into a peremptory undertaking to try, yet notice must also be given of the like motion, for not proceeding to trial in pursuance of the undertaking :^d but the rule requiring a term's notice does not, we have seen,^e extend to a motion for judgment as in case of a nonsuit. To move for such judgment, the roll must be in court at the time the motion is made;^f and if no cause be shewn, the rule is made absolute of course, on an affidavit of service. If the plaintiff mean to resist the application, he should obtain an office copy of the rule, and of the affidavit on which it was granted;^g and the court, on shewing cause, will make the rule absolute or discharge it, according to circumstances; and if discharged, it is either with or without a peremptory undertaking, to try the cause at the next sittings or assizes.

The causes ordinarily assigned, and which are allowed by the court as sufficient excuses for not proceeding to trial, are the plaintiff's own illness, and inability to instruct his attorney,^h the insolvency of the defendant,ⁱ the absence of a material witness,^k or want of documentary evidence,^l &c.; and a slight cause is in general

^a 2 H. Blac. 558.

^u Man. Ex. Pr. 320. and see 5 Price, 187. 7 Price, 531. And see further, as to judgment as in case of a nonsuit, 2 Saund. 336. *b. c.*

^v 1 Chit. Rep. 672.

^w 1 Bos. & Pul. 387.

^x Append. Chap. XXXIV. § 15.

^y *Id.* § 14.

^b Loft, 265.

^c 1 H. Blac. 527. *Ante*, 497.

^d 2 Taunt. 48. For the form of the notice of motion, see Append. Chap.

XXXIV. § 13.

^e *Ante*, 816.

^f Imp. K. B. 9 Ed. 390. Barnes, 313. 1 Bos. & Pul. 388.

^g *Ante*, 506. Imp. C. P. 6 Ed. 327.

^h Barnes, 313.

ⁱ 1 Kenyon, 349. Doug. 671. 7 Taunt. 180.

^k Barnes, 316. 2 Price, 16. 90.

^l 6 Taunt. 150. and see Hullock on Costs, 1 Ed. 405. Imp. K. B. 9 Ed. 390, 91. Imp. C. P. 6 Ed. 328. 1 Chit. Rep. 279. (*a.*)

deemed sufficient on the first application, if the plaintiff will undertake peremptorily to try the cause at the next sittings or assizes:^m and there is no difference in this respect, between *qui tam* and other actions.ⁿ But some reason must be assigned for not proceeding to trial; or the court will not compel the defendant to accept a *peremptory undertaking.^o And, in an action for penalties [*827] for usury, a defendant is entitled to judgment as in case of a nonsuit, if it appear that a witness to the corrupt contract, who is abroad, could not be compelled to give evidence, even if he were in this country.^p An affidavit is usually required, of the facts constituting the excuse for not proceeding to trial; and, in the Common Pleas and Exchequer, of the service of notice of motion: And if the plaintiff defer proceeding, in order to await the decision of the court on a similar question in another cause, the nature of the question, and of the cause in which it arises, should be stated in the affidavit to enable the court to judge of the sufficiency of the excuse.^q But when the rule is opposed on the ground of the absence of a material witness, the name of the witness need not be stated in the affidavit.^r And in opposing the rule for want of documentary evidence, it is not necessary to state what the evidence is:^s And no great precision is required in an affidavit of this nature: Therefore, where the affidavit merely stated that the reason for not proceeding to trial was, that it was not convenient for a material witness to come to town in time for the trial, after it was sworn that an attempt had been made to *subpœna* him, the court said, that although the affidavit was loose, yet as this was the plaintiff's first default, the defendant ought to be content with a peremptory undertaking.^t Where the rule to shew cause was discharged, on an affidavit which contained an answer false in itself, the court would not afterwards open the matter, on an affidavit which disproved the contents of the former one:^u though if it had been suggested at the time, that the answer was false in fact, the court would have suspended their judgment till the matter was examined.^v

When a sufficient excuse is assigned for not trying the cause, the court will discharge the rule for judgment as in case of a nonsuit, without requiring a peremptory undertaking from the plaintiff, to try it at the next sittings or assizes: And where the plaintiff had become insolvent after issue joined, this was allowed to be a good cause against judgment as in case of a nonsuit; and the court would not bind him down to a peremptory undertaking, it being alleged that his creditors were about to decide, whether they would prosecute or abandon the cause.^w So, where the plaintiff in a *qui tam* action, on the statute 7 Geo. II. *c. 8. withdrew his record, [*828] because the broker who negotiated the illegal bargain for stock,

^m 1 Kenyon, 349.

ⁿ 7 Durnf. & East, 178. 1 East, 554.

^o 2 Chit. Rep. 244.

^p 1 Dowl. & Ry. 448.

^q 6 Taunt. 122. 1 Chit. Rep. 280. *in notis* : and see 5 Taunt. 88.

^r 8 Taunt. 104. but see 6 Taunt. 150. *contra*.

^s 6 Taunt. 150. and see 1 Dowl. & Ry. 159.

^t *Wheeler v. Stevens*, H. 59. Geo. III. K. B. 1 Chit. Rep. 280. *in notis*.

^u 3 Durnf. & East, 405.

^v *Id.* 406.

^w *Fisher v. Hancock*, H. 36 Geo. III. K. B.

refused to give evidence, lest he should subject himself to a penalty on the same statute; the court of King's Bench held this to be a sufficient reason to discharge a rule for judgment as in case of a nonsuit, for not proceeding to trial; although the witness's liability to be sued would not be removed, till after the end of three succeeding terms.^a And where the defendant had procured the cause to be stayed by injunction, that court would not compel the plaintiff to give a peremptory undertaking.^a

In general however, a peremptory undertaking is required by the court, on discharging the rule for judgment as in a case of a nonsuit; and it must be given, in the King's Bench, although the trial be deferred on account of the absence of a material witness, and it is doubtful whether the witness will return in time to try the cause at the next sittings or assizes;^b but further time may be obtained, if necessary, on application to the court.^b When the defendant is insolvent, the court will bind the plaintiff down to a peremptory undertaking to try the cause, unless he will consent to stay all further proceedings in the action, and to enter a *stet processus*.^c So, where the plaintiff had held out to the defendant, that he would settle the cause, the court discharged the rule for judgment as in case of a nonsuit, on the plaintiff's undertaking in the alternative, either to pay costs, or to enter a *stet processus*.^d And the plaintiff was allowed to enter a *stet processus*, on paying the costs of the application, on the ground of the defendant's having taken the benefit of an insolvent debtor's act; although the rule for judgment as in case of a nonsuit had been discharged, on the plaintiff's giving a peremptory undertaking, and the debt sought to be recovered was not included in the defendant's schedule, and notice of discharge under the act.^e So, where the defendant had obtained judgment against the plaintiff in the Common Pleas for *twelve* pounds, the latter having suffered judgment to go by default, although he had a claim against the defendant for *ten* pounds, which he neglected to set off in that action, and afterwards the plaintiff brought an action to recover the latter sum in the King's Bench; the court held, that as the defendant had offered to allow the plaintiff the *ten* pounds, he might obtain a rule for judgment as in case of a nonsuit, unless the [*829] plaintiff would either give a peremptory undertaking to try at the next sittings, or discontinue the action and pay costs.^f

In the Common Pleas, it has been determined, that a peremptory undertaking to try, is alone sufficient cause to shew against judgment in case of a nonsuit, for not proceeding to trial, if it be the first default.^g But in practice it is usual, and said to be necessary,^h to shew some reasonable cause by affidavit, for not proceeding to trial, such as the plaintiff's own illness,ⁱ or the absence of a mate-

^a 7 Durnf. & East, 178.

^b *Per Cur.* E. 56 Geo. III. K. B. 1 Chit. Rep. 280, §1. *in notis.*

^c *Hatcher & another v. Hardy*, T. 54 Geo. III. K. B. 1 Chit. Rep. 280. *in notis.* *Aliter* in C. P. Post, 829.

^d 7 Taunt. 180.

^e *Per Cur.* H. 54 Geo. III. K. B. 1 Chit.

Rep. 738. (a.)

^f 1 Chit. Rep. 738.

^g 1 Chit. Rep. 178.

^h 2 H. Blac. 119. *Mallet v. Hilton*, M. 33 Geo. III. C. P. Imp. C. P. 4 Ed. 388. *accord.*

ⁱ Imp. C. P. 6 Ed. 328.

^j Barnes, 313.

rial witness,^k &c.: though, as has been already observed,^l a slight cause is in general deemed sufficient on the first application: And if witnesses are absent, and their return is not immediately expected, this court will not require of the plaintiff a peremptory undertaking to proceed to trial, as the condition of discharging a rule for judgment as in case of a nonsuit.^m In general however, a peremptory undertaking is required in the Common Pleas, as well as in the King's Bench: And where notice of trial has been given and not countermanded, the court will order the plaintiff to pay costs for not proceeding to trial, as well as to give a peremptory undertaking to try the cause at the next sittings or assizes.ⁿ In the Exchequer, the court, on discharging a rule for judgment as in case of a nonsuit, will order the plaintiff to pay the defendant his costs, give a peremptory undertaking, and, if the venue has been changed to a county where no assizes are holden in the spring, consent that the venue shall be brought back to the original county, that the trial may be brought on without further delay.^o

If the rule be made absolute, the defendant having drawn it up with the clerk of the rules in the King's Bench, or secondaries in the Common Pleas, and got it stamped with a *ten* shilling stamp,^p may sign judgment as in case of a nonsuit,^q and tax his costs, &c. But if further time be given on a peremptory undertaking, the plaintiff must draw up the rule, and serve a copy of it on the defendant's attorney; after which, if he do not proceed to trial pursuant to his undertaking, the defendant having obtained an office copy of the rule, should move the court for judgment, on an affidavit of the circumstances:^r And a mistake in the declaration is not a good *excuse for not proceeding to trial, pursuant to an undertaking.* [*830] But where the plaintiff, having given a peremptory undertaking to try at a given sittings, had set down his cause in the paper for those sittings, there being no prospect of the cause being then tried, but omitted to carry the record into the marshal's office, the court held, that the defendant was not entitled to judgment as in case of a nonsuit, for the plaintiff's not proceeding to trial pursuant to such undertaking; as the latter was not bound to carry in the record.^s So, where the plaintiff, in a special jury *tithe* cause, was under a peremptory undertaking to try at the next assizes, the court held the absence of *eleven* special jurymen to be a sufficient reason for his declining to proceed to trial, though a *tales* had been prayed, and some of the talesmen sworn; and discharged a rule *nisi* for judgment as in case of a nonsuit, on a fresh peremptory undertaking to try at the next assizes.^t A peremptory undertaking does not preclude the court from a further enlargement of the time, if they think

^k Barnes, 316. 6 Taunt. 150.

^l *Ante*, 826.

^m 1 Taunt. 118. *Aliter* in K. B. *Ante*, 828.

ⁿ Barnes, 464.

^o 2 Price, 16.

^p 55 Geo. III. c. 184. *Sched.* Part II. § III.

^q For the form of the judgment, see Append. Chap. XXXIV. § 17.

^r *Id.* § 16. In the Exchequer, the rule for judgment is absolute in the first instance. 9 Price, 389.

^s Say. Rep. 74. Say. Costs, 166. S. C.

^t 1 Dowl. & Ryl. 180.

^u 1 Bing. 70.

it reasonable:^{*} Accordingly, when the plaintiff is not prepared to try the cause pursuant to his undertaking, it is usual for him to apply to the court to discharge it, and for liberty to try at a future sitting or assizes, on an affidavit of the facts; which the court will grant, if they see cause, on payment of costs.

In the King's Bench, we have seen,⁷ the court will not give costs for not proceeding to trial, unless a separate motion be made for them: But, in the Common Pleas, the costs are in the discretion of the court;⁸ though they are in general allowed, on discharging the rule for judgment as in case of a nonsuit, on a peremptory undertaking:^a and the same practice prevails in the Exchequer.^b The costs on such judgment depend on the statute 14 Geo. II. c. 17.; which only gives costs to the defendant, where he would have been entitled to them upon a nonsuit: and therefore the tenant is not entitled to costs in a writ of right;^c nor are they allowed as against an *executor*, who merely sues *en auter droit*.^d The costs of the application for judgment as in case of a nonsuit, are governed by the event of it: If the rule be made absolute, they are considered as costs in the cause, to which the defendant is of course entitled, by the [*831] statute 14 Geo. II. c. 17.; but if the rule be discharged, the costs of the application are in the discretion of the court. It is not usual however, in the King's Bench or Common Pleas, to make the *plaintiff* pay such costs, on discharging the rule:^e and where nothing is said respecting costs, the defendant will be entitled to them, if he succeed at the trial, as costs in the cause; though the plaintiff, if he obtain a verdict, will not be entitled to the costs of opposing the rule. In the Exchequer, when the rule for judgment as in case of a nonsuit is discharged, on the plaintiff's giving a peremptory undertaking to try the cause at the next sittings or assizes, the costs of the application are usually directed to be paid by the plaintiff.^f

If the defendant be unable to proceed to trial, on account of the absence of a material witness, or for want of documentary evidence,^g he may move the court in term time, or apply to a judge in vacation, on an affidavit of the facts, to put it off till the next term; or in the Common Pleas, if necessary, till a more distant period:^h And the court of King's Bench, upon application of the defendant, postponed the trial of an information for a misdemeanor, upon the defendant's consenting, by writing under his own hand, to the examination upon interrogatories of a witness for the crown.ⁱ So, that court put off a trial, to enable the defendant to apply for a commission for examining witnesses abroad on interrogatories, in order to support

^{*} Barnes, 313. 515. 1 Chit. Rep. 281.
in notis. 9 Price, 389.

⁷ *Ante*, 819.

^a 7 Taunt. 476. 1 Moore, 251. S. C.

^b 2 H. Blac. 280. 1 Bos. & Pul. 38. 4 Taunt. 592. (a). but see 5 Taunt. 88. 7 Taunt. 476. 1 Moore, 251. S. C. *Ante*, 820. (l).

^c 1 Price, 61. (c). 2 Price, 16. 90. 92. n. 7 Price, 709.

^e 2 Blac. Rep. 1093. 1110.

^d 4 Bur. 1928. Willes, 316. Barnes, 130. S. C. 2 H. Blac. 277. but see 7 Price, 709.

^e Barnes, 316. 464.

^f Forrest, 3. and see 1 Price, 61. (c). 2 Price, 16. 90. 92. n. 6 Price, 202. 8 Price, 94. but see 7 Price, 531. 709.

^g 1 Dowl. & Ry. 159.

^h Pr. Reg. 398, 9. Barnes, 440. S. C.

ⁱ 2 Maule & Sel. 602.

pleas of justification to a declaration for a libel, where it appeared that the plaintiff had not promptly brought his action after the publication of the libel, and had been otherwise dilatory in bringing the cause to issue.^k But the courts will not put off a trial, at the instance of the defendant, on account of the absence of a material witness, after he has pleaded a sham plea, by which a trial has been lost, unless he will pay the money into court;^l nor if he has conducted himself unfairly, or been the cause of any improper delay.^m So, where a cause is removed by the defendant from an inferior court, and in the mean time a witness dies, on account of which the defendant applies to put off the trial, he must bring the money into court, as a condition of the postponement.ⁿ When the defendant pleads in abatement, he must be prepared to prove his plea promptly; and a strong case must be made out, before the court will postpone the trial.^o And the court of Common Pleas refused to put off a trial, on account of *the absence of a material witness, by [*832] whose evidence the defence of *slavery* was intended to be established.^p If the plaintiff refuse to consent to the examination of material witnesses for the defendant, who are going or reside abroad, on interrogatories, the courts will assist the defendant by putting off the trial.^q But where it is necessary to postpone a trial, for the purpose of sending abroad to examine witnesses under a commission, the court of King's Bench will not put off the trial *until* they are examined, which is too indefinite, but only to a definite period.^r And the court of Common Pleas refused, by putting off a trial, or other indirect means, to compel a party to consent to a commission for the examination of witnesses in *Scotland*.^s

In the Exchequer, if there has been any delay in the interval between the issuing of the first process, and the filing of the information against the defendant, and during that interval he has gone abroad on his duty, as well as some of his witnesses, the court, on motion, will postpone the trial.^t And in that court, if the trial of an information has been once postponed, at the instance of the Attorney General, *pro defectu juratorum*, the court will also grant the defendant a rule to shew cause why the trial should not be further postponed, on his application, if in the meantime a material witness, sworn to have been ready on the former occasion, is not forthcoming.^u But the court will not postpone the trial of an information, on the application of the defendant, on the ground of his commission to examine witnesses abroad not having been returned, if they think there has been sufficient time for its return:^v it should be stated in the affidavit, in support of such an application, that the return is expected, and at what time.^w

An application to put off a trial beyond the present sittings, or from sittings to sittings, is never allowed in the King's Bench, on the part of the *plaintiff*, who having a control over his own

^k 1 Chit. Rep. 685.

^l *Stockton v. Hodges*, T. 27 Geo. III. K. B.

^m 1 Bos. & Pul. 33.

ⁿ 1 Chit. Rep. 730. but see *id.* 686. (a).

^o 2 Chit. Rep. 5.

^p 1 Bos. & Pul. 454.

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^q Cowp. 174. Doug. 419.

^r 1 Chit. Rep. 685.

^s 1 Bos. & Pul. 210.

^t 2 Price, 116.

^u 3 Price, 35.

^v *Id.* 221.

record, has only to withdraw it, if he find he is not prepared to try the cause.⁷ Much valuable time is thus saved, which would be wasted in these applications. Nor is there any great hardship imposed upon the plaintiff; for even if the judge were to make an order to put off the trial, he must pay costs to the defendant; and, either way, he could bring on his cause again for trial with equal facility. [*833] But where, *from the sudden indisposition of a witness, who may be able again to attend in the course of a day or two, or for any temporary reason, the plaintiff is prevented from trying his cause in its order in the paper, and yet has ground to believe he shall be able to try it before the sittings are over, it would be too much to make him withdraw his record; and a judge at *nisi prius* will therefore, upon these grounds, make an order for the trial to stand over, till such time as the witness is likely to attend.⁸

The application for putting off a trial should in general be made *two* days at least before the day of trial,^a if the necessity for it was at that time known to the defendant: If not, it might formerly have been made afterwards, even when the cause was called on at *nisi prius*.^b And an application may be made to a judge at *nisi prius*, to put off the trial of an issue directed by the Lord Chancellor.^c But a judge sitting at *nisi prius* at *Westminster* cannot, upon motion, make an order in a cause entered for trial in *London*.^d And an application was refused, to put off a trial at *nisi prius*, in order to enable the plaintiff to amend his declaration, by omitting the *profert* of the bond on which the action was brought.^e In the Common Pleas, it is a general rule of practice, that no motion to put off a trial will be entertained at *nisi prius*, where the motion might have been made in bank in term time.^f It is also a rule in that court, that the judge will never put off the trial of a cause, upon the consent of the parties or counsel, at *nisi prius*; but the plaintiff must either proceed to try, or withdraw his record.^g The intention of this rule is, to prevent the time of the judge who sits at *nisi prius* from being occupied with discussing these motions: And a motion to put off a trial in *London* or *Middlesex*, on account of the absence of a witness, cannot be made, when there is not time to shew cause within the term, if the party applying had it in his power to come earlier.^h When the application is made to a judge at *nisi prius*, notice should first be given to the plaintiff's attorney, with a copy of the affidavit to be produced.ⁱ In other cases it is usual, and seems to be necessary in the Common Pleas,^k to give previous notice of the intended motion.^l

The affidavit should regularly be made by the defendant himself,^m

⁷ 3 Campb. 333, 4. It had been previously decided by Lord *Kenyon*, as was formerly ruled by Lord *Mansfield* in a *Chester* case, that the trial could not be put off, in favour of the *plaintiff*, in an action on a penal statute. M. 38 Geo. III. K. B.

^a 3 Campb. 333, 4.

^b Barnes, 437. Pr. Reg. 401. S. C. Barnes, 442. 444. but see 2 Taunt. 221.

^c Peake's Cas. *Ni. Pri.* 97. Barnes, 452.

^c 4 Campb. 163.

^d 3 Campb. 41.

^e 1 Stark. *Ni. Pri.* 74.

^f 1 Taunt. 565.

^g 2 Taunt. 221.

^h 3 Taunt. 315.

ⁱ Cas. temp. Hardw. 128.

^k Imp. C. P. 372.

^l Append. Chap. XXXIV. § 18.

^m Barnes, 437. Pr. Reg. 401. S. C.

unless he be abroad, or out of the way; in which case it may be made *by his attorney,^a or a third person:^o and in general it states, [*834] that the person absent is a material witness, without whose testimony the defendant cannot safely proceed to trial: that he has endeavoured, without effect, to get him *subpœna'd*; but that he is in hopes of procuring his future attendance.^p The affidavit should state at what time the witness is expected to return:^q But it seems that an affidavit, stating that the witness is not expected to return till a particular day, is sufficient; it being an implied assertion, that he is expected at that time:^q And it does not seem to be necessary to mention in the affidavit, the *name* of the witness.^r An affidavit in the common form is sufficient, when no cause of suspicion appears: But if there be any cause of suspicion, the court should be satisfied from circumstances, first, that the person absent is a material witness; secondly, that the party applying has not been guilty of any laches or neglect; and thirdly, that he is in reasonable expectation of being able to procure his attendance, at the time to which the trial is prayed to be deferred.^s It is not necessary to swear to merits, in order to put off a trial, on account of the absence of a material witness;^t nor will the court in the first instance,^u nor even on a second application,^x impose the terms of paying money into court, or giving security for the same: But upon a second motion to put off a trial, on account of the continued absence of a witness, the court will, if they think proper, enquire into the circumstances; and it is not to be considered that the trial is to be put off as a matter of course.^y On a motion to postpone a trial, upon an affidavit suggesting the absence of the copy of a judicial document in the *West Indies*, sworn to be material and necessary on the trial of the cause, the court would not try the admissibility of the evidence, on an objection that, when it arrived, it could not be admitted; but postponed the trial, until the document should arrive.^z In the Common Pleas, the affidavit as to the witness's being material ought to be positively sworn;^a and the defendant must state particularly in his affidavit, in what respect the evidence is material:^b And that court refused to put off the trial, *because it appeared by the affidavit, that the wit- [*835] ness went out of town, after notice of trial given.^c

There are other causes for putting off the trial, such as the illness of the defendant's attorney,^d or on account of a paper published with

^a Peake's Cas. *Ni. Pri.* 97.

^o Barnes, 448.

^p Append. Chap. XXXIV. § 19.

^q 1 Chit. Rep. 730. (u). 2 Chit. Rep. 411. S. C.

^r 2 Dowl. & Ryl. 420.

^s 3 Bur. 1514. 1 Blac. Rep. 514. S. C. and see 1 Blac. Rep. 436. 8 East, 31. 8 Price, 292.

^t *Duncan v. Thomasin*, M. 38 Geo. II. K. B.

^u *Cookson v. Simpson*, T. 56 Geo. III.

K. B. 1 Chit. Rep. 686. (a).

^x 1 Chit. Rep. 182. 2 Chit. Rep. 411.

S. C.

^y Per Lord *Ellenborough*, Ch. J. E. 55 Geo. III. K. B. 1 Chit. Rep. 686. (a).

^z 1 Dowl. & Ryl. 159.

^a Barnes, 448. Pr. Reg. 402.

^b *Corbyn v. Dawson*, E. 36 Geo. III. C. P. Imp. C. P. 374.

^c Barnes, 442.

^d Say. Rep. 63.

† In a recent case in the K. B. that court expressly declared that it was not necessary to name the witnesses. 4 Dowl. & Ryl. 883.

intent to influence the jury,^e &c. : and when any of these occur, the affidavit should be framed accordingly. If a party be arrested in coming to attend the trial of his cause, the judge at *nisi prius* will put off the trial until he is released, without payment of costs, if any collusion can be shewn to exist between the opposite party and the creditor who arrested him; otherwise, it can only be upon payment of costs.^f But the court will not put off the trial of a cause, brought by the assignees of a bankrupt because a petition is pending against the commission of bankruptcy;^g nor will they put off a trial, pending a suit relating to the same matter in a spiritual court.^h

^e 1 Bur. 512. 4 Durnf. & East, 285. 3 ^g 2 Chit. Rep. 411.
Brod. & Bing. 272.

^f 1 Campb. 229.

^h 2 Salk. 646. 649.

CHAP. XXXV.

OF THE JURY PROCESS; COMMON AND SPECIAL JURIES; VIEWS; EVIDENCE, AND WITNESSES.

HAVING, in the preceding chapter, shewn what is to be done, when the parties are not ready or willing to proceed to trial, I shall next consider, when they are, the preparatory steps to be taken, with regard to the *jury process, common and special juries, views, evidence, and witnesses.*

The first process for convening the jury, in the King's Bench and Common Pleas, is a *venire facias*; which is a judicial writ, commanding the sheriff, or other officer to whom it is directed, to *cause to come* before the king at *Westminster*, (by *bill*, or, by *original*, wheresoever, &c.) in the King's Bench, or before the justices at *Westminster* in the Common Pleas, on a certain day therein mentioned, twelve free and lawful men of the body of the county,^a each of whom has *ten* pounds a year of lands, tenements or rents, at the least,^b by whom the truth of the matter may be the better known, and who are in no wise of kin either to the plaintiff or to the defendant, to make a jury of the country between the parties in the action, because as well the plaintiff as the defendant, between whom the matter in variance is, have put themselves upon that jury; and that he return, the names of the jurors,^c &c.

By the statute *Westm. 2.* (13 *Edw. I.*) c. 30. the clause of *nisi prius* was directed to be inserted in the *venire facias*; and at first the trial was had upon that writ,^d as it still is in the case of a trial at **bar*. This practice was attended with many inconveniencies: [**837*] for in the first place, the jury were not obliged to attend, under any

^a Stat. 4 Ann. c. 16. § 6. and see the statute 24 Geo. II. c. 18. 1 P. Wms. 223. Willcs. 597. 1 Wils. 125. S. C.

^b Stat. 4 & 5 W. & M. c. 24. § 15. And by the 3 Geo. II. c. 25. § 18. any *leaseholder*, for the term of 500 years absolute, or for any term determinable upon life or lives, of an estate in possession in his own right, of the clear yearly value of *twenty* pounds or upwards, over and above the rent reserved, is qualified to serve upon juries; and in *London*, any person is qualified, who is a householder

within the city, and has lands tenements, or personal estate, to the value of *one hundred* pounds. Stat. *ult.* § 19. Also, by the 4 Geo. II. c. 7. § 2. none shall be returned to serve on juries in *Middlesex*, who have served within the two last terms: and by § 3. *leaseholders* for any term, where the improved rents amount to 50*l. per annum*, are liable to serve on juries in *Middlesex*.

^c Append. Chap. XXXV. § 1, &c.

^d Gilb. C. P. 74. 2 Salk. 454. 2 Ld. Raym. 1143. S. C.

penalty, on the day of *nisi prius*; and if they did attend, the defendant might have cast an *essoyn*, and so the jury, after much expense and trouble, were obliged to return, leaving the cause untried.^c Another inconvenience was, that the parties, not seeing the panel before-hand, could not be prepared to make their challenges.^f To obviate this latter inconvenience, it was enacted, by the statute 42 *Edw.* III. c. 11. that "no inquests, except of assize and gaol delivery, shall be taken by writ of *nisi prius* or otherwise, at the suit of any one, before the names of all them that shall pass in the inquests, shall be returned in court." From thenceforward, the clause of *nisi prius* could not be inserted in the *venire facias*, as was directed by the statute *Westm.* 2.: and therefore it was taken out of that writ, and placed in the *distringas* or *habeas corpora*,^g as the practice continues to this day. The *venire* too was made returnable on a day before the trial; by which means they got rid of the *essoyn* at *nisi prius*: for by the statute of *Marlbridge*, (52 *Hen.* III.) c. 13. "after a man hath put himself upon any inquest, he shall have but one *essoyn*, or one default;" and by the statute *Westm.* 2. (13 *Edw.* I.) c. 27. the *essoyn* shall be allowed him at the *next* day, which is the day of the return of the *venire*.^h And though the defendant never appears now, upon the return of the *venire*, yet heretofore he was demanded solemnly; and if he made default, there went out a *distringas* or *habeas corpora* against the jury, with a clause in it to distrain the defendant: and if after this he made default again, it was peremptory, because there was no process left to bring him in.ⁱ If a *venire* be awarded, and the parties do not go to trial for several terms, a new *venire* is awarded from term to term, and the cause continued by *vicecomes non misit breve*;^k but the *venire* never in fact issues, till the term when the cause is tried.

The trial of causes at *nisi prius* is had upon the *distringas*, in the King's Bench,^l and upon the *habeas corpora juratorum*, in the Common Pleas.^m The former is a judicial writ, commanding the [*838] sheriff, or other officer to whom it is directed, to *distrain* the jurors by all their lands and chattels, &c. so that he may have their bodies before the king at *Westminster*, or, (by *original*,) wheresoever, &c. on [the first return day in term, after the trial], or before the chief justice, or judges of assize, if they shall first come on [the day of trial], at [the place where the cause is intended to be tried], to make a certain jury between the said parties, of a plea of, &c. (according to the nature of the action), and to hear thereof their judgment of many defaults,ⁿ &c. The writ of *habeas corpora juratorum* commands the sheriff, &c. that he *have*, before the justices at *Westminster*, on [the first return day in term, after the

^c Gilb. C. P. 74, 5. 78.

^d *Id.* 76, 7.

^e *Id.* 77. 2 Salk. 454. 2 Ld. Raym. 1143. S. C.

^f Gilb. C. P. 74, 5. 77, 8, 1 Salk. 216. 2 Ld. Raym. 925. S. C. 2 Salk. 454. 2 Ld. Raym. 1143. S. C.

^g 1 Salk. 216. 2 Ld. Raym. 925. S. C.

^h Gilb. C. P. 83. and see Append. Chap.

XXXI. § 44. 46.

ⁱ Append. Chap. XXXV. § 6. 9.

^j For the history of these writs, see Gilb. C. P. 72. and for the form of the *habeas corpora juratorum*, in C. P. see Append. Chap. XXXV. § 8.

^k Append. Chap. XXXV. § 6.

trial], or before the chief-justice, or judges of assize, if they shall first come, &c. the *bodies* of the several persons named in the panel annexed to the writ, jurors summoned in court between the parties, (naming them,) of a plea, &c. to make that jury.^o

After a *distringas* or *habeas corpora* had issued, with a clause of *nisi prius*, if the cause stood over, for default of jurors, till a subsequent term, the plaintiff at common law could not have had a *venire de novo*,^p unless for some fault in executing or returning the *distringas* or *habeas corpora*;^q but he must have sued out an *alias* or *pluries distringas*, or *habeas corpora*, for bringing in the same jury. And still, if after a *special* jury has been struck in a *criminal* case, the cause goes off for default of jurors, no new jury can be struck; but the cause must be tried by the jury first appointed.^r And the same jury shall serve for the trial of the cause, notwithstanding an intermediate change of sheriffs.^s But if the same special jurymen are struck to try several causes on the same question, and the court being dissatisfied with the verdict in the first, direct it to abide the event of another cause, they will also on motion discharge the same special jurymen from trying the second cause.^t Where a common jury panel was returned, together with a special jury panel, and, no special jurymen appearing, the cause was tried by a common jury, the trial was set aside.^u

By the statute 7 & 8 W. III. c. 32. § 1. "if any plaintiff or demandant in any cause depending in any of the courts at *Westminster*, which shall be at issue, shall sue forth or bring to any sheriff, any writ of *venire facias*, upon which any writ of *habeas corpora* or *distringas* with a *nisi prius* shall issue, in order [*839] to the trial of such issue at the assizes, and such plaintiff or demandant shall not proceed to the trial of the said issue, at the said first assizes after the *teste* of every such writ of *habeas corpora* or *distringas*, with a *nisi prius*, that then and in all such cases, (other than where *views* by jurors shall be directed),^x the plaintiff or demandant, whensoever he shall think fit to try the said issue at any other assizes, shall sue forth and prosecute a new writ of *venire facias*, directed to the sheriff, in this form: That you cause to come *anew*,^y before, &c. twelve free and lawful men of the *neighbourhood* of *A*. [now of the *body* of your county,] each of whom has *ten* pounds a year, of lands tenements or rents, at the least, by whom, &c. and who neither, &c.: and the residue of the said writ shall be after the ancient manner; which writ being duly returned and filed, a writ of *habeas corpora* or *distringas*, with a *nisi prius*, shall issue thereupon, (for which the ancient and accustomed fees shall be taken, and no more, as in the case of the *pluries habeas corpora* or *distringas*, with a *nisi prius*,) upon which the plaintiff or demandant shall and may proceed to trial, as if no former writ of

^o Append. Chap. XXXV. § 8.

^p Gilb. C. P. 83. and see 2 Saund. 254.

^q (8.)

^r Gilb. C. P. 92. 5 Durnf. & East, 464.

^s 5 Durnf. & East, 453. but see 2 Barn. & Cres. 104.

^t Cowp. 412.

^u 3 Taunt. 404.

^x 4 Maule & Sel. 467.

^y Com. Rep. 248.

^z Append. Chap. XXXV. § 5.

venire facias had been prosecuted or filed in that cause; and so *toties quoties* as the case shall require. And if any defendant or tenant, in any action depending in any of the said courts, shall be minded to bring to trial any issue joined against him, when by the course in any of the said courts he may lawfully do the same by *proviso*, such defendant or tenant shall or may, of the issuable term next preceding such intended trial, to be had at the next assizes, sue out a new *venire facias* to the sheriff, in form aforesaid, by *proviso*; and prosecute the same by writ of *habeas corpora* or *distringas*, with a *nisi prius*, as though there had not been any former *venire facias* sued out or returned in that cause; and so *toties quoties* as the matter shall require."² This statute however does not extend to *criminal cases*.⁴

The *venire* and *distringas*, or *habeas corpora*, are directed, according to the award of these writs,^b to the *sheriff* of the county in which the action is laid, or of an adjoining county: but when the sheriff is a party, or interested in the cause, they are directed to the *coroner*,^b or if there are two sheriffs, and one of them is interested, to the other: and if the coroner, as well as the sheriff, is [*840] interested, "the *venire* and *distringas* are directed to *elisors*." In a county *palatine*, a *mittimus* is awarded to the justices there, commanding them to issue the jury process, and when the cause is tried, to send the record back again to the court above.⁴

In point of form, the *venire* and *distringas*, or *habeas corpora*, are general or special. When only one issue is to be tried, or there are several issues of the same nature, the *venire* and *distringas* or *habeas corpora* are general, to make a jury of the country between the parties, of the plea or action, whatever it may be: But when there are several issues, in fact and in law, or several defendants, and some of them plead and others let judgment go by default, the writs are special, as well to try the issues in fact, as to assess the damages upon the issues in law, or against the defendants who let judgment go by default.^c If the defendant carry down the cause by *proviso*, the following clause is inserted in the *distringas*, or *habeas corpora*: "*Provided always, that if two writs shall come to the sheriff, he shall only execute and return one of them.*"^f

The *venire facias* is *tested* on the first day of the term, in or after which the cause is to be tried: and is made *returnable* on some day before the trial, being a *general* return day or day *certain*, according to the previous proceedings:^g If in a country cause, the *venire* by *original* is made *returnable* on the last general return day, or if by *bill*, on the last day of the term before the assizes: And the *distringas* or *habeas corpora* is tested on the *quarto die post* of the return by *original*, or by *bill* on the return of the

² 2 Saund. 336. b.

^a *Rex v. Franklin*, H. 5 Geo. II. K. B. cited in 5 Durnf. & East, 454, &c.

^b *Ante*, 778, 9.

^c *Ante*, 780.

^d Append. Chap. XXXVI. § 9, 10, 11, 12.

^e 2 Lil. P. R. 636. *Ante*, 780. and see Append. Chap. XXXV. § 3, 4.

^f 2 Lil. P. R. 612. 617. Lil. Ent. 676.

and see Append. Chap. XXXV. § 7.

^g On the traverse of an inquisition out of Chancery, the *venire* is returnable on a general return day. 1 Wils. 77.

venire ; and made returnable on the first general return day or day certain, in term time, after the trial. It is not necessary by *original*, that there should be fifteen days between the teste and return of the jury process.^a The *venire facias* and *distringas*, or *habeas corpora*, are sued out together ; and after being sealed, (for they do not require signing, in the King's Bench,¹) are taken to the sheriff's office to be returned. In causes which stand over from one sitting to another, the writ of *distringas* or *habeas corpora* should be regularly altered and re-sealed, previous to the sitting to which they stand over ; or in default thereof, the causes cannot be tried.^b

*The jury returned by the sheriff, on the *venire facias*, [*841] is *common* or *special*. A common jury is nominated, summoned and returned by the sheriff, pursuant to the *balloting* act, (3 Geo. II. c. 25.) § 8. by which it is enacted, that "every sheriff or other officer to whom the return of the *venire facias juratores*, or other process for the trial of causes, before justices of assize or *nisi prius*, in any county in *England*, doth or shall belong, shall, upon his return of every such writ of *venire facias*, (unless in causes intended to be tried at bar, or in cases where a special jury shall be struck by order or rule of court,) annex a panel to the said writ, containing the christian and surnames, additions and places of abode, of a competent number of jurors, named in the lists mentioned in the act, as qualified to serve on juries, (the names of the same persons to be inserted in the panel, annexed to every *venire facias*,) for the trial of all issues at the same assizes, in each respective county: which number of jurors shall not be less than forty-eight in any county, nor more than seventy-two, without direction of the judges appointed to go the circuit, and sit as judges of assize or *nisi prius* in such county, or one of them ; who are thereby respectively empowered and required, if he or they see cause, by order under his or their respective hand or hands, to direct a greater or lesser number, and then such number as shall be so directed, shall be the number to serve on such jury: and that the writs of *habeas corpora juratorum* or *distringas*, subsequent to such writ of *venire facias juratores*, need not have inserted in the bodies of such respective writs, the names of all the persons contained in such panel; but it shall be sufficient to insert in the mandatory part of such writs respectively, *the bodies of the several persons named in the panel to this writ annexed*, or words of the like import, and to annex to such writs respectively panels, containing the same names as were returned in the panel to such *venire facias*, with their additions and places of abode, that the parties concerned in any such trials may have timely notice of the jurors who are to serve at the next assizes, in order to make their challenges to them, if there be cause: and that for making the returns and panels aforesaid, and annexing the same to the respective writs, no other fee or fees shall be taken, than what were then allowed by law to be taken for the return of the like writs, and panels annexed to the same:

^a Stat. 13 Car. II stat. 2. c. 2. § 6.

habeas corpora, by the clerk of the juries.

¹ In the Common Pleas, the *venire* is signed by the prothonotaries, and the

Imp. C. P. 404.

^b R. E. 33 Geo. III. K. B.

and that the persons named in such panels shall be summoned to [*842] serve on juries; at the then next assizes or sessions of *nisi prius*, for the respective counties to be named in such writs, and no other."¹

And, by § 11. "the name of each and every person who shall be summoned and impanelled as aforesaid, with his addition and the place of his abode, shall be written in several and distinct pieces of parchment or paper, being all as near as may be of equal size and bigness, and shall be delivered unto the marshal of such judge of assize or *nisi prius*, &c. who is to try the cause in the said county, by the under-sheriff of the said county, or some agent of his; and shall, by direction and care of such marshal, be rolled up, all as near as may be in the same manner, and put together in a box or glass to be provided for that purpose."

At the assizes, by a late statute,^m two sets of jurors are directed to be summoned, one to attend at the beginning of each assizes, and the other to attend the residue thereof, to serve indiscriminately on the criminal and civil side: and "the sheriff or other officer, to whom the return of the *venire facias*, or other process for the trial of causes at *nisi prius*, doth belong, shall, upon his return of every such writ or process, annex thereto a panel, containing the christian and surnames, additions, and places of abode, of the persons in each of such sets; and, during the attendance and service of the first of such sets, the jury on the civil side shall be drawn from the names of the persons in that set, and, during the attendance and service of the second of such sets, from the names of the persons in such second set."ⁿ

Upon the execution of a writ of inquiry, the plaintiff, we may recollect, sometimes moves the court for a rule to have a *good jury*,^o which is a better sort of *common jury*:^p and, before the introduction of special juries, this rule appears to have been frequently granted, for the trial of causes at *nisi prius*.^q

A *special jury* is nominated, in the presence of the attornies on both sides, by the master in the King's Bench, or prothonotaries in the Common Pleas, who make out a list of forty eight jurors, from the freeholders' book, or book kept by the sheriff, of persons qualified to serve on juries; out of whom each party is at liberty to strike twelve, and the remaining twenty four are summoned and returned by the sheriff. Special juries appear to have been first introduced in the King's Bench, upon trials at bar, in causes of great consequence; wherein the court would anciently make a rule, [*843] upon motion "and affidavit, for the master to name forty eight freeholders, and that each party should strike out twelve, by one at a time, (the plaintiff or his attorney beginning first,) and that the remaining twenty four should be the jury to be returned for the trial of the cause." A rule having been made accordingly, the plaintiff's attorney attended the master, but the defendant's

¹ See R. E. 1651. K. B.

^m 1 & 2 Geo. IV. c. 46.

ⁿ *Id.* § 4.

^o *Ante*, 623.

^p 5 Durnf. & East, 460.

^q 1 Str. 265.

^r 2 Lill. P. R. 123. and see 4 Barn. & Ald. 476, 7.

attorney would not attend, and thereupon the master nominated forty-eight, in the presence of the plaintiff's attorney only: Upon a motion to set aside this nomination, the court thought fit to order a new jury to be struck; but made it a standing rule for the future, that when the master is to strike a jury, he shall give notice to the attornies on both sides to be present, and if one come and the other do not, he that appears shall, according to the ancient course, strike out twelve, and the master shall strike out the other twelve for him that is absent.* If, by rule of court, the master is ordered to strike a jury, in case it be not expressed in the rule that he shall strike forty-eight, and each of the parties shall strike out twelve, the master is to strike twenty-four, and the parties have no liberty to strike out any.†

Analogous to the practice upon trials at bar, it was sometimes usual, in other cases, where it was conceived an indifferent jury would not be returned, for the court on motion to order the sheriff to attend the master, with the freeholders' book, and the master, in the presence of the attornies on both sides to strike a jury.‡ But probable matter must have been shewn to the court, to induce them to grant this rule:§ and it being doubted, whether it could be had without consent,¶ it was declared and enacted by the statute 3 Geo. II. c. 25. § 15. that "it shall and may be lawful to and for his majesty's courts of King's Bench, &c. on the motion of any plaintiff or plaintiffs, defendant or defendants, in any action cause or suit whatsoever, depending or to be brought and carried on in the said courts of King's Bench, &c. and the said courts are thereby authorized and required, upon motion as aforesaid, to order and appoint a jury to be struck, before the proper officer of each respective court, for the trial of any issue joined in any of the said cases, and triable by a jury of twelve men, in such manner as special juries have been and are usually struck in such courts respectively, upon trials at bar had in the said courts; which said jury, so struck as aforesaid, shall be the jury returned for the trial of the said issue."

* Upon this statute it was holden, that the fees for *striking* [*844] a special jury should be paid by the party applying for it; but that the other expenses of the trial should abide the event of the suit.† This being found inconvenient, gave rise to the statute 24 Geo. II. c. 18. § 1. by which it is enacted, that "the party who shall apply for a special jury, shall not only bear and pay the fees for striking such jury, but shall also pay and discharge all the expenses occasioned by the trial of the cause by such special jury; and shall not have any further or other allowance for the same, upon taxation of costs, than such party would have been entitled unto, in case the cause had been tried by a common jury, unless the judge before whom the cause is tried, shall, *immediately after the trial*, certify in open court, under his hand, upon the back of the record, that the same was a cause proper to be tried by a special jury." And, by

• 2 Lil. P. R. 127. 1 Salk. 405. R. T. 8

W. III. reg. 2. K. B.

• 1 Salk. 405.

• 2 Lil. P. R. 123.

• *Id. ibid.*

• *Id.* 122.

• Say. Costs, 181. 2 Str. 1080. Cas. Pr.

C. P. 138. Barnes, 123. S. C.

the same statute, § 2. "no person who shall serve upon a special jury, shall be allowed or take, for serving on any such jury, more than the judge who tries the cause shall think just and reasonable, not exceeding one pound one shilling, except in causes where a view hath been directed." A certificate for the costs of a special jury, cannot be granted, on the above statute, the day after the trial:^a And when it is granted, the practice has been to allow the sums only paid to the jury in court.^b In *criminal* cases, the judge cannot certify for the costs of a special jury.^c

Since the making of this statute, the motion for a special jury has become a motion of course, requiring only the signature of a counsel or serjeant; upon which a rule is drawn up by the clerk of the rules in the King's Bench,^d or secondaries in the Common Pleas; and an appointment obtained thereon from the master in the former, or prothonotaries in the latter court, to nominate the forty-eight. The rule for a special jury in term time must be served a reasonable time before the day of trial: and therefore, where a cause stood for trial at a sitting in term, and after the rising of the court the day before the trial, the defendant served the plaintiff with a rule for a special jury, and the cause was notwithstanding tried by a common jury, the court of King's Bench held the proceedings to be regular.^e A copy of this [*845] rule and appointment is served upon the opposite attorney, and also on the under-sheriff, who attends the master or prothonotaries, at the time appointed, with the freeholders' book; and the nomination being made, lists of the persons nominated are made out for each party, by the masters' or prothonotaries' clerk. Another appointment is then obtained from the master or prothonotaries, to reduce the jury, and served on the opposite attorney; upon which the attorneys on both sides should attend, and the master or prothonotaries will strike out twelve names for each of them, beginning with the plaintiff first, or, if either of the attorneys do not attend, he will strike out twelve names for him that is absent.^f The usual practice, on striking special juries, is for the sheriff to take the freeholders' book, and select those persons against whose names the addition of *Esquire* is placed: But where the plaintiff moved to set aside the special jury panel, on the ground that some of the persons named therein were retail tradesmen, and therefore not entitled to the addition of *Esquire*, the court of King's Bench held, that as the affidavit did not negative the qualification of the jurors excepted to, they could not interfere.^g

The plaintiff, it seems, ought in all cases to sue out the jury process in the King's Bench, even though the special jury be moved for by the defendant;^h and, in *London*, he chuses his own officer to

^a 3 Campb. 316.

^b 2 Chit. Rep. 154.

^c 1 Esp. Rep. 229. and see 1 Barn. & Ald. 663.

^d Append. Chap. XXXV. § 10: and for the rule for a special jury in the Exchequer, see *id.* § 11.

^e 2 Barn. & Ald. 400. 1 Chit. Rep. 234. S. C. and see R. T. 30 Geo. III. R. H. 44

Geo. III. K. B. 10 East, 1. 2 Campb. *Introd.* xii. by which the rule for a special jury should be drawn up and served, in *London* and *Middlesex*, on or before the day preceding the adjournment day after each term.

^f R. T. 8 W. III. K. B.

^g 1 Chit. Rep. 85.

^h Imp. K. B. 393.

summon them. But, in the Common Pleas, it is said to be usual for the defendant, if he move for a special jury, to sue out the jury process.¹ And the sheriff will not be allowed *extra* expenses of summoning special jurors, on account of their residing at a distance from each other; and therefore the court will make a rule absolute, for the sheriff to refund money received on this account, although he has actually expended all the money.² The practice, as to striking special juries, is nearly the same in *criminal*, as in *civil* cases. In striking a special jury, for the trial of an information filed by the attorney general *ex officio*, the master of the crown office is not bound to take the jurors as they occur upon the sheriff's books, but is to make a selection; and where he had made such selection impartially, the court refused to cancel the list of persons so selected.³ And, in the Exchequer, when it is shewn to the satisfaction of the court, on a statement of facts by affidavit, that in the reduced list of special jurymen, there are persons non-resident or exempt, or that from other causes it is clear there are less than twenty-four effective jurymen remaining on the panel, and it is probable that a [*846] sufficient number cannot be had to attend, on the trial of an information, they will, on motion, order a new jury to be impanelled.⁴

The facility of obtaining a rule for a special jury in civil cases is attended with this inconvenience, that when the cause is to be tried at a sitting in term, the defendant, by obtaining it, may put off the trial till the sittings after term, it not being usual to try special jury causes in term time; by which means, the plaintiff is delayed from getting judgment till the next term, which may be at the distance of some months. To obviate this inconvenience, it is usual, in the King's Bench, when a rule for a special jury has been obtained for the mere purpose of delay,⁵ to move the court, on an affidavit of the circumstances, for a rule to shew cause, why the rule for a special jury should not be discharged; which the court will make absolute, on an affidavit of service, unless good cause be shewn to the contrary. But the court will not discharge the rule for a special jury, when there is sufficient reason to believe, that it is material for the defendant to have his cause tried by such a jury:⁶ And where an ejectment by *original* was appointed for trial at the last sittings in term, and the defendant obtained a rule for a special jury, the court refused to discharge the rule, on the ground of its having been applied for too late; because the plaintiff could not have obtained judgment as of the term, supposing he had succeeded.⁷ If a defendant, however, who has obtained and served a rule for a special jury, take no further steps upon it, the plaintiff will be entitled to have the cause tried in its regular order, as a common jury cause; and the court will not afterwards relieve the defendant, except under very special circumstances.⁸

¹ Imp. C. P. 4 Ed. 397. *Sed quare*; and see Imp. C. P. 5 Ed. 396, 7.

² 1 Chit. Rep. 175.

³ 1 Barn. & Ald. 193. and see 1 Chit. Rep. 85. (a).

⁴ 8 Price, 220.

⁵ 1 Chit. Rep. 489, 90.

⁶ *Id.* 176. 236. 490. *in notis*.

⁷ *Id.* 236.

⁸ 2 Stark. N. Pri. 369. and see 1 Chit. Rep. 534.

In the Common Pleas, when a rule for a special jury has been obtained, for the purpose of delay, it is not usual, as in the King's Bench, to move the court, on an affidavit of the circumstances, for a rule to shew cause, why the rule for a special jury should not be discharged: But if delay be suggested as the motive for the application, and not satisfactorily denied, the practice seems to be, for the court to direct the cause to be tried by a special jury within the term,* unless such terms are offered as will obviate the objection;† and giving judgment of the term is not in all cases satisfactory. When the application, however, is merely to regulate the trial, it must be made, not to the court, but to the judge who presides at [*547] *nisi prius*.‡ And *where it was not suggested by the plaintiff, that delay was the motive for the defendant's application for a special jury, the court would not interfere; although it was sworn that the defendant had acknowledged the debt, and the deponents believed he had no defence to the action.¶ So where, in an action on a bond, the defendant, after plea, had admitted the debt, but obtained a rule for a special jury, the court would not order the cause to be tried within the term, unless the plaintiff stated further grounds, from which they might judge, whether it was a fit cause to be tried by a special jury, or not.‡

In actions of *waste*, trespass *quare clausum fregit*, and other actions, when it appears to the court to be proper and necessary that the jurors, whether common or special, who are to try the issues, should, for the better understanding of the evidence, have a *view* of the messuages, lands or place in question, the court is authorized by the statute 4 Ann. c. 16. § 8. "to order special writs of *distringas* or *habeas corpora* to issue, by which the sheriff, or other officer to whom they are directed, shall be commanded to have *six* out of the first *twelve* of the jurors named in such writs, or some greater number of them at the place in question, some convenient time before the trial, who then and there shall have the matters in question shewn to them, by two persons in the said writs named, to be appointed by the court;‡ and the said sheriff or other officer, who is to execute the said writs, shall, by a special return upon the same, certify that the view hath been had, according to the command of the said writ." And, by the 3 Geo. II. c. 25. § 14. where a view shall be allowed in any cause, in such case *six* of the jurors named in such panel, or more, who shall be mutually consented to by the parties or their agents on both sides, or if they cannot agree, shall be named by the proper officer of the respective courts of King's Bench, &c. for the causes in their respective courts, or if need be, by a judge of the respective courts where the cause is depending, or by the judge or judges before whom the cause shall be brought

* 4 Taunt. 470. 4 Moore, 414. 470.

† 4 Moore, 414.

‡ 7 Taunt. 390.

¶ 4 Moore, 414.

‡ *Id.* 470.

‡ Append. Chap. XXXV. § 14, 15.

on to trial respectively, shall have the view, and shall be first sworn upon the jury to try the cause."

Before the statute 4 *Ann.* c. 16. there could have been no view, till after the cause had been brought on trial; when, if the court saw the question involved in any obscurity, which might be cleared *up by a view, the cause was put off, that the jurors might have [*848] a view before it came on again.² Upon this statute, it had become the practice to grant a view of course, upon the motion of either party: And a notion having prevailed, that *six* of the first twelve upon the panel must attend upon the view, and appear at the trial, and that if they did not, the cause must be put off, the judges thought it their duty to interfere, and to take care, that their ordering a view should not obstruct the course of justice, and prevent the cause from being tried: for they were all clearly of opinion, that the act of parliament meant that a view should not be granted, unless the court were satisfied that it was proper, and necessary; and they thought it better that a cause should be tried upon a view had by any six, or by fewer than six, or even without any view at all, than that the trial should be delayed for a great length of time. Accordingly they resolved, not to order a view any more, without a full examination into the propriety and necessity of it, unless the party applying would come into such terms as might prevent an unfair use being made of it.⁴ Agreeably to this resolution, they required a consent, which has ever since been made a part of the rule, that in case no view be had, or if a view be had by any of the jurors, though not six of the first twelve, or of those mutually consented to by the parties or their agents, yet the trial shall proceed, and no objection be made on either side on account thereof, or for want of a proper return to the writ.⁵

In actions of *waste*, and trespass *quare clausum fregit*, the necessity for a view in general appears on the face of the pleadings; and in other cases, the motion for it has become a motion of course in the King's Bench, requiring only counsel's signature; upon which a rule of court⁶ is drawn up in term time, or a judge's order in vacation: But in the Common Pleas, it is said that a rule for a view is never granted without an affidavit in any case, except in an action of *waste*,⁷ and therefore, in other cases, an application must be made for the rule, to the court in term time, on an affidavit of the circumstances;⁸ and in *vacation*, a judge's order for it cannot be obtained, without the consent of the opposite attorney.⁹ In the Exchequer, the court will not grant a view of the premises, where the question may be tried by the production of a model.¹⁰ And there can be no view in a *criminal* case, without consent.¹¹

*The rule for a view is made out by the clerk of the rules [*849] in the King's Bench, or secondaries in the Common Pleas; and it is

¹ 1 Bur. 253. 2 Salk. 665. 11 East, 184.

² 1 Bur. 253.

³ *Id.* 257. and see Append. Chap. XXXV. § 12, 13.

⁴ Append. Chap. XXXV. § 12, 13, 21.

⁵ Barnes, 467.

⁶ Append. Chap. XXXV. § 16. For

the form of the rule in C. P. see *id.* § 17. and for the form of the rule in the Exchequer, see *id.* § 19:

⁷ Imp. C. P. 399.

⁸ 1 Price, 130. and see 2 Chit. Rep. 422.

⁹ 1 Kenyon, 384.

always made a part of the rule or order, that the expenses of taking the view shall be equally borne by both parties, and that no evidence shall be given on either side, at the time of taking thereof.¹ But it has been holden, that on a view, the shewers may shew marks, boundaries, &c. to enlighten the viewers; and may say to them, "these are the places to which we shall adapt our evidence on the trial."² Before the rule or order is drawn up, an application should be made to the opposite attorney, for the name of his shewer; and the names of both shewers must be inserted in the rule or order, and also in the writ of *distringas*,¹ or *habeas corpora*,^m &c. with the time and place of meeting for proceeding on the view. If the opposite attorney will not name a shewer, an appointment for that purpose should be obtained on the rule, from the master or prothonotaries; who, in case of non-attendance, will name one *ex parte*.^a The rule or order being drawn up, a copy of it must be served on the opposite attorney, and the original left with the sheriff, together with the names of the jurors, if *special*, and he will summon them; if *common*, he will summon such as he thinks proper.

The next circumstance to be attended to is the *evidence*; for unless the parties are prepared to prove their allegations, it is needless for them to go to trial: And herein, there are two things to be principally considered in every action, first, *what* is to be proved; and secondly, the *manner* of proving it. The evidence in all cases is governed by the pleadings; it being necessary to prove every thing that is put in issue, and no more. On the general issue, the plaintiff must prove the whole of his case; but on a special issue, it is only necessary to prove the particular point referred to the jury; for whatever is not expressly denied, is admitted by the pleadings. The manner of proof depends on the nature of the evidence, which is written or unwritten.^o In general, the parties must come prepared with the best existing evidence the nature of the case admits of;† and the witnesses must be such as are not interested in the event of the suit.[‡] But when an objection is made to a witness, that admits of any doubt, the courts, of late years, have endeavoured as far as [*850] possible, consistently with the old cases; to let the objection go to his *credit*, rather than his *competency*.^q

¹ Append. Chap. XXXV. § 12, 13, 17.
19. 21.

² Barnes, 458.

¹ Append. Chap. XXXV. § 14, 15, 20.

^m *Id.* § 18.

^a *Id.* C. P. 398, 9.

^o Gilb. Evid. 5. Bul. N. Pri. 221.

^p *Cas. temp. Hardw.* 358. 4 Bur. 2251.

³ Durnf. & East, 27.

^q *Cas. temp. Hardw.* 358. 4 Bur. 2251.

³ Durnf. & East, 27. 1 Durnf. & East, 300.
and see the statute 46 Geo. III. c. 37. for

† And this expression, best evidence, means, best legal evidence; therefore the court will reject illegal evidence, although both parties agree to admit it. 2 *Stark. N. Pri. Rep.* 455.

‡ And this, mediately as well as immediately. Thus, the wife of bail is incompetent to give evidence for the defendant, on whose behalf her husband became bound. 8 *Dowl. & Ryd.* 65.

Written evidence is either *public* or *private*.^r Some public writings are of record; others, not of record: and public writings, not of record, may be distinguished into such as are of a judicial nature, and such as are not judicial.^s Records are acts of parliament, or judgments and recognizances, &c. which are the memorials of the legislature, and of the king's courts of justice, preserved in rolls of parchment; and they are considered of such high authority, that no evidence is allowed to contradict them.^t Letters patent^u also, judicial writs,^x and affidavits, when read and filed,^y are considered as matters of record. Acts of parliament either relate to the kingdom in general, and are therefore called general or *public* acts, or only to the concerns of private persons, and are thence called *private* acts.^z Of the former, the printed statute book is evidence; but of the latter, the regular proof is by an examined copy, compared with the original in the parliament office at *Westminster*.^a Of other records, as they cannot be removed from place to place, copies are admitted, as the best producible evidence.^b These copies are of two kinds; first, under seal; and secondly, not under seal.^c Copies under seal are called exemplifications, and are of higher credit than any sworn copy.^e Exemplifications are twofold; first, under the great seal; or secondly, under the seal of the court.^e The former are of themselves records of the greatest validity.^e But when a record is exemplified under the great seal, it must be either a record of the court of Chancery, or sent for into Chancery, which is the centre of all courts, by writ of *certiorari*; and from thence the subject receives a copy under the attestation of the great seal.^d The second sort of copies under seal are exemplifications under the seal of the court;^e and these are of higher credit than a sworn copy.^e Copies *not under seal are of two sorts; first, sworn copies; and [*851] secondly, office copies.^f But the copy of a copy is no evidence; it not being the best the nature of the case admits of.^g

With regard to office copies, a difference is taken between a copy authenticated by a person trusted for that purpose, which is evidence without further proof, and a copy given out by an officer of the court, who is not trusted for that purpose, which is not evidence, without proving it to have been actually examined.^h Thus, the chirograph of a fine is evidence of such fine; because the chirographer is appointed to give out copies of the agreements between the par-

declaring the law with respect to witnesses refusing to answer. And for the law of evidence in general, and what evidence is required in particular cases, and the competency or incompetency of witnesses, see *Trials per pais*; *Gilbert's Law of Evidence*; the Abridgements of *Viner* and *Bacon*, tit. *Evidence*; *Comyn's Digest*, tit. *Testimoine*; *Buller's Nisi Prius*; *Espinasse's Nisi Prius*, Vol. 2. Part. III.; and the treatises on evidence, by *Peake* and *Phillipps*.

^r *Gilb. Evid.* 7. *Bul. Ni. Pri.* 221.

^s *Phil. Evid.* 4 Ed. 308.

^t *Co. Lit.* 117. b. 260. a. *Gilb. Evid.* 7.

Bul. Ni. Pri. 221.

^u *Peake's Evid.* 5 Ed. 32. (c).

^x *Gilb. Evid.* 40. *Bul. Ni. Pri.* 234. 1
Kenyon, 345. *Say. Rep.* 299. S. C.

^y 2 *Wils.* 371.

^z *Gilb. Evid.* 11, 12. *Bul. Ni. Pri.* 222.

^a *Gilb. Evid.* 12, 13. *Bul. Ni. Pri.* 225.

^b *Bul. Ni. Pri.* 226.

^c *Gilb. Evid.* 19. *Bul. Ni. Pri.* 226.

^d *Gilb. Evid.* 19, 20.

^e *Id.* 20. *Bul. Ni. Pri.* 227, 8.

^f *Gilb. Evid.* 24. *Bul. Ni. Pri.* 228.

^g *Id.* 10. *Bul. Ni. Pri.* 226.

^h *Id.* 25. *Bul. Ni. Pri.* 229.

ties, that are lodged of record.^b But where a fine is to be proved with proclamations, (as it must be to bar a stranger,) the proclamations must be examined with the roll; for though the chirographer is authorized by the common law to make out copies for the parties, of the fine itself, yet he is not appointed by the statutes to copy the proclamations, and therefore his indorsement on the back of the fine is not binding.¹ So, when a deed is enrolled, the indorsement of the enrolment is evidence, without further proof of the deed; because the officer is entrusted to authenticate such a deed by enrolment: but if the officer of the court make out a copy, when he is not entrusted for that purpose, it ought to be proved to have been examined.^k And the office copies of depositions are evidence in Chancery; but not at common law, without examination with the roll: for though that court have, for their own convenience, empowered their officers to make out such copies as should be evidence, yet the particular rules of that court are not taken notice of by the courts of common law; and therefore they are not evidence in those courts.^l

Public writings, of a *judicial* nature, are judgments in the House of Lords;^m proceedings in Chancery;ⁿ sentences in the ecclesiastical courts,^o courts of admiralty,^p and foreign courts;^q judgments in inferior courts, not of record;^r rules of court;^s affidavits, not filed; [*852] inquisitions;^t and awards,^u &c.: to which may be added, the books of the Quarter sessions,^v and books kept by the clerk of the judgments,^w and other officers of the courts,^x and the prison books of the King's Bench and Fleet prisons.^y Public writings, not judicial, are the journals of the lords or commons;^b the *London Gazette*, for acts of state, such as the king's proclamations, and addresses to the crown, &c.; domesday book; surveys of ecclesiastical benefices, &c.; the pope's bull, and licence, on questions respecting tithes, or the appropriation of benefices; the ancient books of the herald's office, and their visitation books of counties, on questions of pedigree; books of history, to prove matters relating to the kingdom in general; parish registers,^c of christenings, marriages, and burials; rate books, or books for parish indentures;

^b Gilb. Evid. 25. Bul. Ni. Pri. 229.

¹ *Id.* 26, 7. Bul. Ni. Pri. 230.

^k *Id.* 25, 6. Bul. Ni. Pri. 229.

^l Bul. Ni. Pri. 229. And see further, as to depositions, Gilb. Evid. 60, &c. Bul. Ni. Pri. 239, &c. 2 Esp. Ni. Pri. 257, 8, 9. Peake's Evid. 5 Ed. 57, &c. Phil. Evid. 4 Ed. 360, &c. 394, &c.

^m Gilb. Evid. 18. Peake's Evid. 5 Ed. 36. Phil. Evid. 4 Ed. 396. Cowp. 17.

ⁿ Gilb. Evid. 47, &c. Bul. Ni. Pri. 235, &c. 2 Esp. Ni. Pri. 253, &c. Peake's Evid. 5 Ed. 53, &c. Phil. Evid. 4 Ed. 392, &c.

^o 2 Esp. Ni. Pri. 259, &c. Peake's Evid. 5 Ed. 67, 8. Phil. Evid. 4 Ed. 328, 333, &c. 396, &c.

^p Peake's Evid. 5 Ed. 69, 70. Phil.

Evid. 4 Ed. 338, &c.

^q Phil. Evid. 4 Ed. 343, 4, 5. 399, 400. and see 3 East, 221. 2 Stark. Ni. Pri. 6.

^r Com. Dig. tit. *Evidence*, C. 1. 2 Blac. Rep. 836. and see Peake's Evid. 5 Ed. 72, 3. Phil. Evid. 4 Ed. 396. 2 Stark. Ni. Pri. 473.

^s *Ante*, 496.

^t Phil. Evid. 4 Ed. 375, 6. 392.

^u *Id.* 381. 400.

^v *Ante*, 646.

^w *Ante*, 603.

^x Append. Introd. xxix. xxx.

^y *Ante*, *356.

^b Gilb. Evid. 18. Peake's Evid. 5 Ed. 52, 3. Phil. Evid. 4 Ed. 404.

^c *Ante*, 647.

rolls of courts baron;^d ancient terriers, or surveys of parishes or manors, which are either ecclesiastical or temporal; corporation books;^e and public books of the *Navy* office, *Custom* house,^f *Stamp* and *Post* offices,^g *Bank*,^h *South Sea* house,ⁱ *East India* company,^j &c. With regard to the proof of entries in public books, it is now clearly settled, that whenever an original is of a public nature, and admissible in evidence, an examined copy will equally be admitted.^k This rule is necessary, as well for the security of the document, as for the convenience of the public. But when the original is of a private nature, a copy will not be evidence, unless the original be lost or destroyed, or in the possession of the adverse party.^l

Written evidence, of a *private* nature, is either of deeds under seal, or agreements, &c. not under seal;^m and it is either in the possession of a party to the suit, or his adversary, or of a third person. When deeds or writings are in the possession of the party, he may produce them, proving, when necessary, that they were duly executed. *When they are in the possession or power of the [*853] adverse party, there are in general no means of compelling him to produce them;ⁿ but the practice in such case is to give him, or his attorney, a regular notice to produce the original;¹ not that, on proof of the notice, he is compellable to give evidence against himself, but the consequence will merely be, that the other party, who has done all in his power to supply the best evidence, will be allowed to go into evidence of an inferior kind, and may read an examined copy, or give parol evidence of the contents.^m And where *A.* bound himself as surety for *B.*, to pay *C.* the balance of an account between *B.* and *C.* within a certain time after notice, it was holden, in an action by *C.* against *A.*, that parol evidence of such notice could not be given, without proof of the usual notice to produce it.ⁿ But where, from the nature of the action, the defendant has notice that the plaintiff means to charge him with the possession of the instrument, it is not necessary to give him any other notice than the action itself supplies.^o In an action of *trover* therefore, for a bond, or bills of exchange, &c. though it was formerly the practice to give notice to produce them at the trial,^p yet such notice is now holden to be

^d *Ante*, 648. and see Gilb. Evid. 73. Bul. *Ni. Pri.* 247. 2 Esp. *Ni. Pri.* 264. Peake's Evid. 5 Ed. 85. Phil. Evid. 4 Ed. 429, 30.

^e *Ante*, 648, 9.

^f *Ante*, 647. And see further, as to evidence of public writings, not judicial, Gilb. Evid. 73, &c. Bul. *Ni. Pri.* 247, &c. 2 Esp. *Ni. Pri.* 264, &c. Peake's Evid. 5 Ed. 77, &c. Phil. Evid. 4 Ed. 402, &c. and as to the inspection of public writings in general, see Peake's Evid. 5 Ed. 89, &c. Phil. Evid. 4 Ed. 422, &c. *Ante*, 646, &c.

^g 3 Salk. 154. Comb. 337. Skin. 383. S. C. and see Phil. Evid. 4 Ed. 421, 2.

^h Phil. Evid. 4 Ed. 422.

ⁱ As to the evidence of *private* writings, see Gilb. Evid. 77, &c. Bul. *Ni. Pri.* 249, &c. 2 Esp. *Ni. Pri.* 270, &c. Peake's Evid. 5 Ed. 93, &c. Phil. Evid. 4 Ed. 435, &c. And for the cases in which the parties are compellable to produce them, see Phil. Evid. 4 Ed. 472, 3. *Ante*, 494. 639, &c.

^j Phil. Evid. 4 Ed. 474, 5.

^k Append. Chap. XXXV. § 22. and see Peake's Evid. 5 Ed. 103, &c. Phil. Evid. 4 Ed. 474, 5, &c.

^l Phil. Evid. 4 Ed. 475.

^m 2 Stark. *Ni. Pri.* 174. and see 12 East, 237. 2 Moore, 349. *Ante*, 336.

ⁿ Phil. Evid. 4 Ed. 477.

^o 1 Esp. Rep. 50.

unnecessary:^a and the principle of the rule requiring notice, does not apply to the case where a party to the suit has fraudulently got possession of a written instrument belonging to a third person; as where a witness was called on the part of the defendant, to produce a letter written to him by the plaintiff, and it appeared that, after the commencement of the action, he had given it to the plaintiff; in this case, though a notice to produce had not been given, parol evidence of the contents was admitted, because the paper belonged to the witness, and had been secreted in fraud of the *subpœna*.^r

When a notice is required, it need not be given to the defendant himself, even in penal actions;^a notice to his attorney or agent being deemed sufficient.^a But, in an action by the plaintiffs *A.* and *B.*, as assignees of *C.*, against *E.*, a notice to produce a document, entitled "*A.* and *B.* assignees of *C.* and *D.* against *E.*" is insufficient, although *A.* and *B.* are in fact the assignees of *C.* and *D.* [*854] And a *notice served on the wife of the defendant's attorney at his lodgings, to produce a lease, on the evening before the trial, is too short.^u

The regular time of calling for the production of papers, is not until the party who requires them has entered upon his case; and till that period arrives, the other party may refuse to produce them; and there can be no cross examination as to their contents, although the notice to produce them is admitted:^x And if one party call for papers in the possession of the other, but, when they are produced, decline using them, the mere calling for them will not make them evidence for the adverse party.^y If, however, the party who has called for papers, inspect them, he thereby makes them evidence for the other party, although he has not used them himself in evidence.^{z†} If a defendant call on the plaintiff to produce at the trial a deed in his custody, to which the plaintiff is a party, and under which he claims a beneficial estate, it is not necessary that the defendant should call the attesting witness to prove the due execution of the deed, when produced:^a but in other cases, the execution ought to be regularly proved by the party who offers the instrument as part of his evidence in the cause.^b And if a party, in compliance with the notice, produce the written instrument in his possession, he is entitled to have the whole read;^b and if a writing produced refer to others, with such particularity as to make

^a 4 Taunt. 868. *per Gibbs, J.*

^r 4 Esp. Rep. 256. and see Peake's Evid. 5 Ed. 95. *Id.* Append. p. xxviii. xxix. S. C. Phil. Evid. 4 Ed. 478.

^s 3 Durnf. & East, 306.

^t 2 Stark. *Ni. Pri.* 17.

^u 1 Stark. *Ni. Pri.* 283. and see 5 Esp. Rep. 46. 2 Chit. Rep. 403, 4.

^v 2 Stark. *Ni. Pri.* 22, 3. 49.

^x 1 Esp. Rep. 210.

^y 5 Esp. Rep. 235. and see Phil. Evid. 4 Ed. 476.

^z 3 Taunt. 60. and see 2 Moore, 513. Gow, 26. 6 Moore, 347. 3 Brod. & Bing. 139. S. C.

^a Phil. Evid. 4 Ed. 485. but see 3 Stark. *Ni. Pri.* 140.

† After a notice to defendant to produce cheques, the plaintiff calls for one of them. All are put into his hand, and after looking them over, he selects one. Held, that as the plaintiff did not take the first that offered itself, defendant is entitled to have the whole read. *Manning's Digest, Practice, E. (c) 47.*

it necessary to inspect them, that the sense may be complete, or, referring to other writings, adopt them as part of its own meaning, he may insist on having these also read in evidence.*

On a notice to produce papers, if they are not produced, this circumstance affords no legal ground for any inference respecting their contents, but merely entitles the opposite party to prove their contents by parol evidence.^d But before this secondary evidence can be admitted, it ought to be clearly shewn, that the writing required is in the possession of the other party, and that a notice to produce it has been regularly served;^e it not being sufficient that the attorney admits the receipt of it.^f This notice may be proved by a duplicate original,^g without notice to produce the other original;^h and slight evidence is *sufficient in many cases to raise a presumption [*855] that the writing is in the possession of a party, when it exclusively belongs to him, and ought regularly to be in his possession, according to the usual course of business.ⁱ

When a deed or other writing, necessary to be produced on the trial of a cause, is in the possession or power of a third person, the legal process for compelling him to produce it, is by suing out a writ of *subpœna ad testificandum*; which is also the mode of enforcing the personal attendance of witnesses, when required to give *parol* or unwritten evidence. This is a judicial writ, issued on a proper *præcipe*,^j commanding them to appear at the trial, to *testify* what they know in the cause, on the part of the plaintiff or defendant, as the case is, under the penalty of one hundred pounds each.^k Four witnesses only can be put in one writ of *subpœna*;^l and therefore it is frequently necessary to have several writs, which are signed and sealed. The name of a witness, though not in the original *subpœna*, may it seems be inserted therein at any time, if he have been regularly served with a copy.^m And if a cause appointed for one sitting be made a *remanet*, the *subpœna* must be re-sealed and re-served:ⁿ it having been determined, that where a notice of writing is given in such case for the last sitting, instead of a *subpœna*, the court will not grant an attachment thereon against the witness for non-attendance.^o

If a witness have in his possession any deeds or writings, which it is deemed necessary to produce at the trial, there should be a special clause inserted in the *subpœna*, called a *duces tecum* commanding the witness to bring them with him.^p The writ of *subpœna duces tecum* is the regular and established process of the court; and though it was formerly doubted,^q yet it is now settled, that this

* 4 Esp. Rep. 21. 5 Esp. Rep. 246. 1 Campb. 171. Phil. Evid. 4 Ed. 485.

^d 3 Camp. 363.

^e Phil. Evid. 4 Ed. 475.

^f 1 Esp. Rep. 216.

^g *Id.* 455. 4 Esp. Rep. 203. Phil. Evid. 4 Ed. 480.

^h Phil. Evid. 4 Ed. 475. And see further, as to notice to produce deeds and writings, &c. Peake's Evid. 5 Ed. 93, 4. 103, 4, &c. Phil. Evid. 4 Ed. 474, 5, &c.

ⁱ Append. Chap. XXXV. § 23.

^j *Id.* § 24.

^k Cowp. 846.

^l Holt N. Pri. 526.

^m *Sydenham v. Rand.* T. 24 Geo. III. K. B.

ⁿ *Id. ibid.* *Gillet v. Mauman*, T. 47 Geo. III. C. P.

^p Append. Chap. XXXV. § 26. and see *Clerk's Manual*, 31. *Thes. Broo.* 304. *Off. Broo.* 385.

^q 1 Esp. Rep. 405. 4 Esp. Rep. 43.

process is of compulsory obligation on the witness, to produce the deeds or writings required of him, which he has in his possession, and which he has no lawful or reasonable excuse for withholding; of the validity of which excuse the court, and not the witness is to judge.* And a person in possession of any paper, who is served with [*856] a *subpœna duces tecum*, is bound to produce it, whether the paper belong to him or not;† or though there be a regular way prescribed by law for obtaining it.‡ The court however, in all such cases, will exercise their discretion, in deciding what papers shall be produced, and under what qualifications, as respects the interest of the witness.§

The *subpœna* being issued, a copy thereof should be made for each witness, and personally delivered to him,“ a reasonable time before the day of trial; for witnesses ought to have a convenient time, to put their own affairs in such order, as that their attendance upon the court may be of as little prejudice to themselves as possible:” and notice in *London*, at two in the afternoon, for the witness to attend the sittings at *Westminster* that evening, has been held to be too short.¶ Where the witness lives within the weekly bills of mortality, it is usual to leave a shilling with the copy of the *subpœna*: but where he lives at a greater distance, he is not obliged to attend, unless his reasonable expenses are paid or tendered him, not only for going to, but also for returning from the trial; and when less is offered, the witness is not obliged to trust to the court’s allowing him more when he comes to the book, for perhaps the party may not call him, and then it may be difficult for him to get home again.* And when an officer of the court is served with a *subpœna duces tecum*, to produce a judgment book, if the personal attendance of the officer be necessary, he must be informed so, or the court will not grant an attachment.† It was not formerly necessary, upon summoning a witness before commissioners of bankrupt, to be examined touching the bankrupt’s effects, to tender him the expenses of his journey before-hand; though if he were in fact without the means of taking the journey, it might have been an excuse for not obeying the summons.‡ The rule was, that the witness must attend, and was entitled to have his reasonable expenses, to be settled by the commissioners.§ But, by the statute 3 Geo. IV. c. 81. § 2. “when a witness is summoned to attend before the commissioners, at the meeting appointed by them for opening the commission, the necessary expenses shall be tendered to such witness, in the same manner as is now by law required, upon service of a *subpœna*, to a witness in an action at law.”

* 9 East, 473.

† 6 Esp. Rep. 116. and see 1 Campb. 14. Holt *Ni. Pri.* 241. *in notis.*

‡ Holt *Ni. Pri.* 239. 3 Stark. *Ni. Pri.* 140. And see further, as to the *subpœna duces tecum*, Peake’s Evid. 5 Ed. 196, 7. Phil. Evid. 4 Ed. 411, 12.

§ 2 Str. 1054.

¶ 1 Str. 510.

¶ *Id. Ibid.* and see 5 Esp. Rep. 46. 2 Chit. Rep. 403, 4. *Ante*, 853, 4.

* 2 Str. 1150. 13 East, 16. (a). S. C. more fully stated. 1 Blac. Rep. 36. 1 H. Blac. 49. 2 Chit. Rep. 201.

† 2 Chit. Rep. 403.

‡ 8 East, 319.

§ 2 Rose, 75.

*A witness attending on a *subpœna* is, we have seen,^d [*857] privileged from arrest. But if he neglect to attend, without having a sufficient excuse, he is liable to be proceeded against three ways; first, by attachment, for a contempt of the process of the court;^e secondly, by special action on the case for damages, at common law;^f and thirdly, by action on the statute 5 Eliz. c. 9. § 12. for the penalty of *ten* pounds, and also for the further recompence given by that statute, if it has been previously assessed by the court out of which the process issued.^g An attachment lies against an attorney in the cause, for not attending upon a *subpœna*, to give evidence of collateral facts;^h and it may be even had against a peer of the realm.ⁱ Also, by the mutiny act,^k "all witnesses duly summoned by the judge advocate, or person officiating as such, who shall not attend on courts martial, shall be liable to be attached in the court of King's Bench, &c. upon complaint made to the said court, in like manner as if such witness had refused to attend on a trial, in any criminal proceeding in that court." But in order to ground this summary mode of proceeding, it is necessary to prove that the witness was personally served, a sufficient time before the trial,^l and that his reasonable expenses were paid or tendered him.^m The motion for an attachment against a person *subpœna'd* as a witness, for not attending, should, as in other cases of contempt, be brought forward as soon as possible: and therefore the court refused an attachment in *Hilary* term, for non-attendance at the preceding summer assizes, and left the party to his civil remedy.ⁿ

In the Common Pleas, it was not formerly usual for the court to grant an attachment against a witness, for non-attendance upon a *subpœna*; but the party aggrieved was left to his remedy by action.^o And in a late case, that court refused an attachment against a witness, who being *subpœna'd* without particular notice when the cause would come on, left the court to attend to urgent business; the cause having been tried in his absence, and the plaintiff nonsuited for want of his evidence.^p So, an attachment was refused, where the witness was induced to leave the court, by the representation of the adverse attorney.^q So, where the witness resided twenty-four miles from the *assize town, and his expenses were not tendered to [*858] him till the evening before the trial, the court would not grant an attachment:^r So, an attachment was refused against a witness, who omitted to attend at a trial, after being served, on the 3rd of July, with

^d *Ante*, 221. &c. Peake's Evid. 5 Ed. 198, 9.

^e 1 Str. 510. 2 Str. 810. 1054. 1150. Comp. 386. Doug. 561. *Ante*, 485.

^f Doug. 561.

^g *Id. ibid.*

^h 2 Str. 810. 2 Ld. Raym. 1528. S. C. Comp. 845. but see 3 Bur. 1687.

ⁱ Say. Rep. 50. 1 Wils. 332. S. C. but *vide ante*, 194.

^k 3 Geo. IV. c. 13. § 28.

^l 2 Str. 1054.

^m *Id.* 1150. 1 Blac. Rep. 36. 8 East, 323. 13 East, 16. (n.)

ⁿ ——— v. *St. Leger*, H. 37 Geo. III. K. B.†

^o Barnes, 33. 35. 497. Fr. Reg. 435. 1 H. Blac. 42. and see 13 East, 16. (a). *Ante*, 485.

^p 5 Taunt. 260.

^q *Id.* 262.

^r 6 Taunt. 9. 1 Marsh. 410. S. C.

a *subpœna* dated the 18th of June, and calling on him to attend on the 2nd of July: And in general, they will not grant an attachment against a witness for not appearing to give evidence, unless a clear case of contempt be made out against him.¹ An attachment, however, was granted against a witness, where, after a *subpœna* served on him, he attended in court, and during the opening of the plaintiff's case, thinking he was not able to prove a particular fact, he left the court, and the plaintiff was nonsuited for want of his evidence.²

It has been ruled at *nisi prius*, that no action lies against a witness for non-attendance, unless the cause has been called on, and jury sworn.³ But the propriety of this doctrine was questioned by the court in a subsequent case; by which it seems, that a party who is *subpœna'd* to attend as a witness, is guilty of a contempt, by neglecting to attend, although the cause be not called on for trial.⁴ And though the court of Common Pleas, in one case,⁵ would not grant an attachment against a witness, where the affidavit did not state that he was duly called on his *subpœna* at the trial, yet from a subsequent case⁶ it seems, that whenever it is distinctly shown, that the party meant to disobey the order of the court, he is guilty of a contempt; and that the calling of the witness upon his *subpœna*, is only for the purpose of obtaining clear evidence of his having neglected to appear, but that it is not necessary, if it can be clearly shown by other means, that the party has disobeyed the order of the court.

When the witness is detained in prison, a *habeas corpus ad testificandum*^b is necessary, to bring him up; for which an application is made to the court or a judge, upon an affidavit^c sworn to by the party applying,^d stating that he is a material witness, and willing to attend;^e and if he be at a distance, the court will expect it to be specially shown how he is material.^f Upon this application, the court in their discretion will make a rule, or the judge, if he think proper, will grant his *fiat* for the writ, which is then sued out, signed and sealed: And the court of King's Bench, in one instance, issued a writ of *habeas corpus ad testificandum*, to bring up a prisoner to give evidence before an election committee of the House [*859] of Commons, on affidavit *of service of a rule to shew cause on the different persons concerned, no cause being shewn.^g But doubts having arisen, whether the justices of his majesty's courts of record at *Westminster* had power to award writs of *habeas corpus*, for bringing persons detained in custody, under civil or criminal process, before courts martial, commissioners of bankrupt, commissioners for auditing the public accounts, or other commissioners

¹ 1 Bing. 366.

² 6 Taunt. 9. 1 Marsh. 410. S. C. *Ante*, 485. (a.)

³ 3 Moore, 579. and see 3 Barn. & Ald. 598. 4 Barn. & Ald. 202.

⁴ Peake's Cas. *Ni. Pri.* 60.

⁵ 3 Barn. & Ald. 598.

⁶ 3 Moore, 223.

⁷ 3 Barn. & Ald. 600. *per Best*, J.

^b Append. Chap. XXXV. § 29.

^c *Id.* § 27.

^d Fort. 396.

^e Cowp. 672. *Per Cur.* H. 20 Geo. III. K. B. *Rex v. Murray*, M. 26 Geo. III. K. B. Peake's Evid. 5 Ed. 198.

^f *Standard v. Baker*, M. 26 Geo. III. K. B.

^g 4 East, 587.

acting under commission or warrant from his majesty; it was enacted, by the statute 43 Geo. III. c. 140. that "it shall be lawful for any judge of his majesty's court of King's Bench or Common Pleas respectively, or for any baron of his majesty's court of Exchequer, of the degree of the coif, at his discretion, to award a writ or writs of *habeas corpus*, for bringing any prisoner or prisoners detained in any gaol or prison, in that part of the united kingdom of *Great Britain and Ireland*, called *England*, before any court martial, or before any commissioners of bankrupt,^b commissioners for auditing the public accounts, or other commissioners, acting by virtue or under the authority of any commission or warrant from his majesty, his heirs or successors, for trial, or to be examined touching any matter depending before such courts martial or commissioners respectively; and the like proceedings shall be had upon such writ or writs of *habeas corpus*, so to be awarded as aforesaid, as by law may now be had upon writs of *habeas corpus*, for bringing persons detained in gaol before magistrates or courts of record, for such purposes as aforesaid." The application for a *habeas corpus* under this statute, ought to be made to a judge out of court.ⁱ

And, by the statute 44 Geo. III. c. 102. for the more effectual administration of justice in *England and Ireland*, by the issuing of writs of *habeas corpus ad testificandum* in certain cases; "it shall be lawful for any judge of his majesty's courts of King's Bench or Common Pleas of *England and Ireland* respectively, or any *baron of his majesty's court of Exchequer, of the degree of [*860] the coif in *England*, or any baron of his majesty's court of Exchequer in *Ireland*, or any justice of oyer and terminer or gaol delivery, being such judge or baron as aforesaid, at his discretion, to award a writ or writs of *habeas corpus*, for bringing any prisoner or prisoners detained in any gaol or prison, before any of the said courts, or any sitting of *nisi prius*, or before any other court of record in the said parts of the said united kingdom, to be there examined as a witness or witnesses, and to testify the truth before such courts, or any grand, petit, or other jury, in any cause or causes, matter or matters, civil or criminal, depending or to be inquired into or determined in any of the said courts: And that every justice of great session in *Wales*, and in the county palatine of *Chester*, shall have the like authority within the limits of his juris-

^b By the statute 5 Geo. II. c. 30. § 6. bankrupts in custody upon mesne process, were to be brought before the commissioners, and the expense thereof paid out of the estate; if in execution, the commissioners were to attend them in prison. And now, by the statute 49 Geo. III. c. 121. § 13. reciting that great inconveniences had arisen from the necessity of the attendance of commissioners of bankrupt in prison, to take the examinations of bankrupts charged in execution; it is enacted, that "every bankrupt, being

in custody at the time of his or her last examination, although charged in execution, shall be brought before the commissioners, to be examined by them, in the same manner as is now practised with respect to bankrupts in custody on mesne process; and the gaoler or keeper of the prison in which such bankrupt is or shall be confined, shall be fully indemnified, by the warrant of the commissioners, for bringing up such bankrupt for that purpose."

ⁱ 2 Maule & Sel. 582.

diction."^k But a *habeas corpus ad testificandum* will not lie, to bring up a prisoner of war:^l And where the application for it appeared to be a mere contrivance, to remove a prisoner in execution, the court refused to grant it.^m The writ being sued out, should be left with the sheriff, or other officer in whose custody the witness is detained, who will bring him up, on being paid his reasonable charges.ⁿ

When a material witness is going or resides abroad, so that he cannot attend at the trial, the party requiring his testimony may move the court in term time, or apply to a judge in vacation, for a rule or order to have him examined on interrogatories *de bene esse*,^o before one of the judges of the court, if he reside in town, or if in the country or abroad, before commissioners specially appointed, and approved of by the opposite party.^p The rule or order for this purpose cannot be obtained without *consent*, the depositions of witnesses upon interrogatories not being the best existing evidence the nature of the case admits of; for though cross interrogatories may be filed, yet the full benefit of a cross examination cannot be supplied by depositions:^q and therefore, without the consent of the defendant, the court on motion will not give the plaintiff leave to examine an attesting witness to a deed upon interrogatories, and to give such examination in evidence at the trial, on the ground that he is incapable through illness of attending in person, and that he is not likely to recover so as to be able to attend, notwithstanding it also appears by the affidavit, that the defendant had at one time admitted the execution of the deed; nor will they, on these grounds, grant a rule for dispensing with the attendance of such witness at the trial.^r The court, however, will do every thing in their power to make the parties consent, when necessary; as by putting off the trial, at the instance of the defendant, if the plaintiff will not consent;^s and if the defendant refuse, the court will not give him judgment as in case of a nonsuit. In the Exchequer, the court will grant a commission to examine a witness who is in this country, on an affidavit of his being under a necessity of going abroad before the day of trial, although the cause be not at issue, and the answer has not come in.^t

The rule or order being obtained, for the examination of witnesses on interrogatories, a *commission*^u issues, when necessary, on a five shilling stamp;^v and *interrogatories*,^w which ought not to be

^k And see the statute 55 Geo. III. c. 157. for the better examination of witnesses, in the courts of equity in *Ireland*.

^l Dong. 419. and see 6 Durnf. & East, 497. 7 Durnf. & East, 745.

^m 3 Bur. 1440.

ⁿ 1 Crompt. 248, 9. *Qu.* whether the officer may not require an *indemnity*, against the prisoner's escape? *Id. ibid.*

^o Append. Chap. XXXV. § 30, 31, 2.

^p 1 Crompt. 229. Append. Chap. XXXV. § 33. and see 2 Price, 166. 172. 8 Price, 290. as to the practice of the court of Exchequer, in granting the defendant a commission to examine wit-

nesses abroad.

^q Barnes, 447.

^r 4 Taunt. 46. and see 2 Chit. Rep. 199.

^s Cowp. 174. Doug. 419. and see 1 Bos. & Pul. 210. *Ante*, 832.

^t 1 Price, 449. and see *id.* 381. as to the costs of witnesses in that court.

^u Append. Chap. XXXV. § 34. and for the oath of the witnesses, commissioners, and clerks, see *Id.* § 35, 6, 7.

^v Stat. 48 Geo. III. c. 149. *Sched. Part. II.* § III. 55 Geo. III. c. 184. *Sched. Part. II.* § III.

^w Append. Chap. XXXV. § 38, 9, 41.

leading, are prepared, and copied on a similar stamp,^a and signed by a counsel or serjeant: This done, a copy of the interrogatories is given, on a four-penny stamp,^a to the opposite attorney, with notice of the time when the witness is to be examined, in order that he may file cross interrogatories,^a if he think proper. At the time appointed, the witness is taken, with the interrogatories, to the judge's chambers, or before the commissioners appointed by the rule or order, where he is examined; and his depositions being taken and sworn to, copies are made out, on four-penny stamped paper,^b and delivered to the party requiring them. It is no objection to the proceedings under a commission to examine witnesses abroad, that a clerk to the plaintiff's attorney is appointed one of the commissioners, and settled the draft of the depositions of one of the plaintiff's witnesses.^c And where a commission directed the commissioners to examine the witnesses on interrogatories, and to reduce the examinations into writing in the *English* language, and send the same to *England*, and to swear an interpreter, to interpret the depositions of such witnesses as did not understand the *English* language; and it appeared by the *return, that the depositions, in the first instance, were reduced into writing in the *foreign* language, and translated by the interpreter into the *English* language, within an interval of *six* weeks; the court held, that the commission was well executed, by the commissioners returning the depositions, so translated into the *English* language.^d

As the depositions, however, are only taken *de bene esse*, they cannot be made use of, if the witness should happen to be in this country at the time of the trial.^e And, to entitle a party to read depositions taken upon interrogatories, it is not sufficient to shew that the witness is a seafaring man, and that he lately belonged to a vessel lying in the river *Thames*, without proving that any efforts had recently been made to find him.^f But the rule is not to be taken so strictly, as to render it absolutely necessary that a witness who is about to go abroad, should be on his voyage when the trial comes on: If the ship has sailed, though it may have put back, or if the witness be on board and the ship ready to sail, though prevented by contrary winds, that it seems would be sufficient.^g A copy of the deposition of a witness, examined upon interrogatories at the chief justice's chambers, signed by the chief justice, and delivered out by his clerk, must be taken *primâ facie* to be a correct copy of what has been sworn by such witness; nor need the original examination be produced, unless some suspicion of forgery be thrown upon the signature of the deponent.^h And depositions taken under an old commission, may it seems be admitted, without producing the commission, as it may be presumed to be lost; but it

^a Stat. 48 Geo. III. c. 149. *Sched. Part II. § III.* 55 Geo. III. c. 184. *Sched. Part II. § III.*

^b Append. Chap. XXXV. § 40.

^c 55 Geo. III. c. 184. *Sched. Part II. § III.*

^d 4 Moore, 424.

^e 4 Barn. & Ald. 377.

^f 2 Salk. 691. 12 Mod. 493. and see Rul. *Ni. Pri.* 239. 1 Campb. 172. 1 Chit. Rep. 89. (a.)

^g 1 Campb. 171.

^h 6 Esp. Rep. 92.

ⁱ 1 Campb. 101. Willis on *Interrogatories*, 27.

is otherwise in the case of a recent transaction, where the depositions have been lately taken : In the latter case, the commission should be produced; but there is no occasion to produce the bill and answer upon which it was founded, provided the authority under which the depositions were taken be produced.¹ If the master of a vessel, examined on interrogatories, refer to his log book, the parts referred to may be read as part of his depositions.² And if one of the questions refer to a letter, the letter must be produced, or the whole of the examination will be rejected : The party cannot abandon the particular question only.³ When a witness is examined on interrogatories by the plaintiff, and cross interrogatories on the part of the defendant, although it should appear, when [*863] his evidence is *read at the trial, that he was an interested witness, and ought to have been released, his evidence notwithstanding may be read, without proving him to have been released previous to such examination: The objection is too late at the trial; and should have been made at the time he was examined:⁴ or the court should be moved to suppress the deposition, if it be illegally or irregularly taken, without staying till it be produced at *nisi prius*.⁵

The party succeeding is not entitled to the costs of examining his witnesses on interrogatories, or taking office copies of depositions; but the party whose witnesses are examined pays his own expense, unless it be otherwise expressed in the rule.⁶ And this holds as well with regard to witnesses examined abroad, as in this country:⁷ The reason is, that by the practice of the court of Chancery, a party applying for a commission to examine witnesses on his behalf, must pay the expenses; and unless the courts of law adopted the same rule, with respect to the party applying for leave to examine witnesses abroad on depositions, which cannot be done without the other party's consent, such consent would never be given, but the applicant would be driven to the expense of applying for a commission.⁸ But, in the Common Pleas, where the rule of court for examining witnesses by commission, expressed that the depositions of witnesses at *Hamburgh* and *Lubeck* were to be taken, and the commission was directed to persons at *Hamburgh*, and the costs were ordered to abide the event of the trial, the expenses of bringing witnesses from *Lubeck* to *Hamburgh* were allowed on taxation.⁹ The defendant having put off the trial, on the terms that a witness, who was going abroad, should be examined on interrogatories, the court of King's Bench held, that the plaintiff having detained the witness until the trial, after he had been examined on interrogatories, and

¹ 6 Esp. Rep. 85.

² 1 Campb. 171.

³ 5 Esp. Rep. 246.

⁴ Holt *Ni. Pri.* 485. And see further, as to interrogatories at law, and the depositions thereon, Willis on *Interrogatories*, 24, &c.

⁵ *Per Cur. M.* 20 Geo. III. K. B.

⁶ 2 East, 259. In *E.* 24 Geo. III. K. B. Master *Forster*, on being asked by the court, said, that costs of examining wit-

nesses on interrogatories, were always borne by the party obtaining the rule for that purpose; and did not abide the event of the cause, unless it was so ordered by the court. This case was cited by the court, as shewing the rule, in 2 East, 259. and see *Hullock on Costs*, 2 Ed. 439.

⁷ 8 East, 393.

⁸ *Id.* 393, 4.

⁹ 3 Bos. & Pul. 556.

cross examined by the defendant, was entitled to the costs of the detention; but that the defendant was entitled to deduct his costs of the interrogatories for cross examining the witness.*

By the statute 13 Geo. III c. 63. § 44. it is enacted, that "when and as often as the *East India* company, or any person or persons *shall commence and prosecute any action or suit, in law or [*864] equity, for which cause hath arisen in *India*, against any other person or persons, in any of his majesty's courts at *Westminster*, it shall and may be lawful for such courts respectively, upon motion there to be made, to provide and award such writ or writs, in the nature of a *mandamus* or commission, as therein mentioned, for the examination of witnesses; and such examination being duly returned, shall be allowed and read, and shall be deemed good and competent evidence, at any trial or hearing between the parties in such cause or action."† These writs have been accordingly issued in several cases in the King's Bench;‡ and in one of them,§ the motion being made on the last day of term, the court awarded such a writ, even before issue joined. And the court of Common Pleas, in a late case, granted a *mandamus* to the court in *India*, to examine witnesses on behalf of the defendant in a *civil* action.¶

When a witness is sent for from abroad *bonâ fide*, for the purpose of the cause, and not for any other purpose, or for any other action, it is in the discretion of the master in the King's Bench, or prothonotaries in the Common Pleas, to allow the costs of bringing him over, and of sending him back, as well as the expense of maintaining him here; whether he were sent for and arrived before,‡ or after the commencement of the action:‡ And where a foreigner, being in this country before the commencement of an action, was detained to give evidence upon a trial, the courts will allow the costs of detaining him, computed from the day of the writ sued out, to the day of trial.‡ So, where the captain of a merchant's ship, domiciled in this country, was detained by the plaintiff for a considerable time, to give evidence in a cause, before it was at issue, the court of King's Bench held, *that the master was at liberty, in taxing the costs, to allow [*865] the expense of maintaining the witness during such detention.‡ But it is not usual, in that court, to allow merchants coming from abroad

* 1 Chit. Rep. 89.

† For the form of a rule for the examination of witnesses in *India* on this statute, see Append. Chap. XXXV. § 42. and for the *mandamus* thereon, *id.* § 43. And see the statutes 24 Geo. III c. 25. for establishing a court of judicature, for the more speedy and effectual trial of persons accused of offences committed in the *East Indies*; § 78. 81. and 42 Geo. III. c. 85. by which offences committed by persons employed in any public service abroad, may be prosecuted in the court of King's Bench in *England*; § 1. and that court is authorized on motion to award a writ of *mandamus* to any court of judicature, or the Governor, &c. of the country where the offence was commit-

ted, to obtain proof of the matters charged; § 2. and may order an examination on interrogatories *de bene esse*, where *vivâ voce* evidence cannot conveniently be had. § 3. and see 8 East, 31.

‡ *Mulick v. Lushington*, M. 26 Geo. III. K. B. *East India Company v. Lord Malden*, E. 32 Geo. III. K. B. *Taylor v. East India Company*, M. 33 Geo. III. K. B. § *Spalding v. Mure*, T. 35 Geo. III. K. B.

‡ 1 Brod. & Bing. 519. 4 Moore, 313. D. C.

‡ 4 Taunt. 55. 3 Taunt. 379. *contra*.

‡ 1 Marsh. 563. 4 Taunt. 695. *contra*.

‡ 4 Taunt. 697.

‡ 1 Barn. & Cres. 276. 2 Dowl. & Ryl. 424. S. C.

as witnesses, a compensation for their loss of time.⁴ And where A. furnished goods abroad for B. the owner of a ship, at the request of C. the captain, who drew the bills on B. payable to A. which B. refused to accept, whereupon A sent for a witness from abroad, for the support of an action against B., pending which C. arrived in this country, and A. then discontinued his action against B. and commenced another against C., in which he recovered by means of the witness he had brought from abroad, the court of Common Pleas held, that C. was only liable for the costs of the witness while detained in this country, and not for those of bringing him over, or of sending him back.⁵

In the King's Bench, the expenses of a person sent to inquire after the subscribing witnesses to a bond, are not allowed on the taxation of costs:⁶ nor will the court allow the expenses of witnesses, if brought too early to attend a trial at the assizes.⁷ But the court will not direct the master to review his taxation, because he has allowed for witnesses who were not called.⁸ And where there is reasonable ground for supposing that the evidence of a witness will be admissible, the master may allow his expenses, on taxation of costs, against the other party.¹ In the Common Pleas, no costs are allowed for a witness, who has not been paid before the claim is made.² But where the plaintiff had *subpœna'd* witnesses, and paid their expenses after they had been previously *subpœna'd* by, and received their expenses from the defendant, without the knowledge of the plaintiff, the court allowed the latter the expenses he had paid those witnesses for their attendance, although they were not called for him at the trial.³ And the plaintiff is entitled to a sum paid for the postage of foreign letters, sworn to be solely applicable to the cause.⁴ Compensation for loss of time, in attending as witnesses, is only allowed to medical men and attorneys:⁵ Merchants coming [*866] from abroad as witnesses, are not entitled to such compensations;⁶ nor scientific persons, unless they are medical men, such as physicians or surgeons:⁷ And the expense of experiments necessarily made for the purpose of affording evidence, on a point in dispute, new to scientific men, is not allowed on the taxation of costs.⁸

⁴ 5 Maule & Sel. 156. and see 4 Moore, 300. 1 Brod. & Bing. 515. S. C. 6 Moore, 235. 3 Brod. & Bing. 72. S. C. *Id.* 292.

⁵ 6 Taunt. 88. 1 Marsh. 463. S. C. And see further, as to the expenses of witnesses from abroad, Phil. Evid. 4 Ed. 3, 4.

⁶ 3 Maule & Sel. 89.

⁷ 2 Chit. Rep. 200.

⁸ *Id. ibid.*

¹ 1 Barn. & Cres. 267.

² 3 Brod. & Bing. 292.

³ 7 Taunt. 337. 1 Moore. 76. S. C.

⁴ 3 Brod. & Bing. 292.

⁵ 5 Maule & Sel. 156, 159. (a). 4 Moore, 300. 1 Brod. & Bing. 515. S. C. 6 Moore, 242. 3 Brod. & Bing. 75. S. C. *id.* 292.

⁶ 5 Maule & Sel. 156. *Ante*, 865.

⁷ 3 Brod. & Bing. 75. 6 Moore, 242. S. C.

⁸ 5 Moore, 235. 3 Brod. & Bing. 72. S. C.

CHAP. XXXVI.

OF THE RECORD OF NISI PRIUS; ENTERING THE CAUSE FOR TRIAL; AND REFERENCES TO ARBITRATION.

THE record of *nisi prius*, which is supposed to be transcribed from the issue roll, contains an entry of the declaration and pleadings, and the issue or issues joined thereon, with the award of the *venire facias*, as in the issue or paper book; and is in nature of a commission to the judges at *nisi prius*, for the trial of the cause.^a It begins with the *placita*, or style of the court, of the term issue was joined; and, in the King's Bench, after the award of the *venire facias*, there is always a second *placita*, of the term in or after which the cause is tried.^b But, in the Common Pleas, there is no second *placita*, when the parties go to trial the same term issue is joined, unless on the death or change of a chief-justice.^c The record then concludes with an entry, called the *jurata*,^d stating that "the jury is respited before the lord the king, or his justices, at *Westminster*, or (by *original* in the King's Bench,) wheresoever the king shall then be in *England*, until the return of the *distringas* in the King's Bench, or *habeas corpora juratorum* in the Common Pleas, unless the chief-justice or judges of assize shall first come on the day of trial, at the sittings or assizes, for default of the jurors, because none of them did appear;" and the sheriff is required to have the bodies of the jurors, to make the said jury accordingly: After which, at the assizes in the King's Bench, and at the sittings also in the Common Pleas, the *jurata* ends with what is called the *sciendum*,^e being a certificate of the delivery of the writ of *distringas* or *habeas corpora*, to the deputy sheriff of the county, to be executed according to law, &c.

In the King's Bench, the record of *nisi prius* was formerly made out by the clerks of the chief clerk:^f but it is now done by the attorneys; and is to be fairly engrossed, on a press or skin [*868]

^a Append. Chap. XXXVI. § 1, 2. and for the record in the Exchequer, see *id.* § 4, &c.

^b *Id.* § 1.

^c Gilb. C. P. 80, 81. 1 Crompt. 234. 2 Saund. 254. b. (8.) Append. Chap. XXXVI. § 2. And for the form of a *pla-*

cita in the Common Pleas, on the death or removal of a chief-justice in term time, see *id.* § 3.

^d Append. Chap. XXXVI. § 1, 2.

^e *Id.* *ibid.*

^f R. T. 1 Jac. II. R. M. 5 Ann. reg. 1. K. B.

of parchment, stamped with a *ten* shilling stamp.⁵ The record being engrossed, is carried to the *nisi prius* office, where it is sealed and passed; for which is paid seven shillings and sixpence for the first eight sheets, seven shillings for every eight sheets after, and sixpence to the sealer.⁶ In *London* and *Middlesex*, all records of *nisi prius* are to be sealed, on or before the respective days appointed by the lord chief justice, in the sittings paper, for their trial.¹ And there is an old rule of court, that no record of *nisi prius*, for the trial of an issue at the *assizes*, shall be sealed after the end of three weeks next after the end of the term.² But by obtaining a judge's order, for which the clerk is paid two shillings, and which he will procure at his leisure, the record may now be sealed at any time before the assizes.¹ In causes which stand over from one sitting to another, the records should be regularly re-sealed, previous to the sitting to which they stand over; or in default thereof, the causes cannot be tried.³

In the Common Pleas, the record of *nisi prius* was formerly engrossed, on an issue of a preceding term, by the clerk of the treasury;⁴ but it is now made out in all cases by the plaintiff's attorney, except where the cause is tried by *proviso*; and should be engrossed in a fair legible character, beginning every pleading with a new line, and the first word thereof in a greater character than the rest; and where there are several counts, they should be noticed by figures in the margin.⁵ The record of *nisi prius* being engrossed, is taken, with the warrants of attorney, to the clerk of the warrants, who will mark the record; it being a rule in the Common Pleas, that the clerk of the treasury shall not sign or seal any record of *nisi prius*, unless the same be first signed or stamped by the clerk of the warrants or his deputy, to the end it may thereby appear that the warrants of attorney are duly filed.⁶ The record is then taken to the prothonotaries, who sign it, and are required to take care that it is properly engrossed;⁷ after which it is signed and sealed by the clerk of the treasury: and it is a rule, that records of *nisi prius* for [*869] the assizes, *shall be signed by the prothonotaries, and signed and sealed by the clerk of the treasury, within three weeks next after the end of every *Hilary* term, and of every *Trinity* term, unless, for reasonable cause, a special warrant shall be obtained for that purpose.⁸

If the issue has not been previously entered of record, it must be so entered, or at least an *incipitur* made, before the passing of the record of *nisi prius*: For it is a rule of court in the King's Bench, that "no record of *nisi prius* shall be sealed, or passed at the *nisi prius* office, by the *custos brevium*, or any clerk of that office, before

⁵ R. M. 5 Ann. reg. 1. (b). K. B. Stat. 48 Geo. III. c. 149. Sched. Part II. § III. 55 Geo. III. c. 184. Sched. Part II. § III.

⁶ R. M. 5 Ann. reg. 1. (a.) K. B.

¹ R. E. 7 Geo. I. K. B.

² R. T. 31 Car. II. K. B. and see former rules of T. 15 Car. II. reg. 2. R. H. 15 & 16 Car. II. reg. 2. R. H. 20 & 21 Car. II. K. B. R. T. 29 Car. II. reg. 4. C. P.

¹ R. T. 31 Car. II. (a). K. B.

² R. E. 33 Geo. III. K. B. 2 Wils. 144.

C. P.

³ R. M. 1654. § 21. R. T. 29 Car. II. reg.

2. C. P.

⁴ R. T. 39 Car. II. reg. 2. C. P.

⁵ R. H. 2 & 3 Jac. II. C. P. Ante, 92. 617.

⁶ R. T. 29 Car. II. reg. 2. C. P.

⁷ R. T. 29 Car. II. reg. 2. C. P.

the issue in that cause be fairly entered on record, or an *incipitur* thereof, and such entry, with the record of *nisi prius*, be first brought to and signed by the secondary; for which no fee shall be demanded or paid, but the usual and accustomed fee due to the chief clerk, for entry of such issue on record."^a And in the Common Pleas it is a rule, that the prothonotaries shall not sign any record of *nisi prius*, until the issue, or an *incipitur* thereof, shall be fairly entered upon record, and the fees first paid for the entry thereof.⁴ In practice it is usual, in the King's Bench, when the issue has not been previously entered, to make an *incipitur* on a roll of the term issue was joined, and to take the roll, record of *nisi prius*, and draft of the issue, to the clerk of the judgments; who enters the issue, and marks the roll, record and issue paper, taking three shillings and sixpence for the first *ten* sheets, and one shilling for every *six* more. Parol evidence is inadmissible, to prove the day on which a cause was tried at *nisi prius*; but it should be proved by the production of the *nisi prius* record.⁴

In the Exchequer, the record begins with the *placita*,² or style of the court; and after setting out the pleadings, as in the issue,⁷ proceeds with the award of the writ of *venire facias*, and the sheriff's return thereto, of a panel of the names of the jurors; and, on their non-appearance, a *distringas* is awarded for bringing them in; after which the record concludes by requiring the parties to attend before the chief baron, or justices of assize, on the day of trial, and afterwards in court, to hear judgment:² And if the cause is to be tried in the country, a commission issues to the justices of assize, for the trial of it,⁸ the statute of *nisi prius* extending only to the courts of King's Bench and Common Pleas.^b This commission con- [*870] tains a clause of *mittimus*;^c And when the cause is to be tried in a county palatine, a writ of *mittimus* is issued in the King's Bench and Common Pleas, as well as in the Exchequer, for carrying down the record.^d

The parties being prepared, and ready to proceed, the cause is *entered* for trial, with the clerk of the papers in the King's Bench, or secondaries in the Common Pleas, on a trial at bar; or with the marshal, at *nisi prius*.

In the King's Bench, the old rule for entering causes in *London* and *Middlesex* was, that unless they were entered with the chief justice, *two* days before the sittings at which they were to be tried, the marshal might enter a *ne recipiatur*, at the request of the defendant or his attorney.^e And this rule still holds, with regard to trials

^a R. M. 5 Ann. reg. 1. K. B. See also the rules of H. 1649. E. 1657. T. 1 Jac. II. K. B. R. E. 5 W. & M. reg. 1. C. P. *Ante*, 792.

^b R. E. 5 W. & M. reg. 1. C. P. and see R. M. 1654. § 21. C. P. *Ante*, 792.

^c 6 Esp. Rep. 80. 83.

^d Append. Chap. VIII. § 112.

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^e Append. Chap. XXXI. § 6.

^f Append. Chap. XXXVI. § 4, 5.

^g *Id.* § 8.

^h *Ante*, 807.

ⁱ Append. Chap. XXXVI. § 8.

^j *Id.* § 9, 10, 11, 12.

^k R. H. 15 & 16 Car. II. reg. 2. K. B.

at the sittings in term. But if a cause was to be tried at the sittings after term, a *ne recipiatur* could not be entered, until after proclamation made, by order of the chief justice, for bringing in the record: and then, if the record was not brought in, the defendant's attorney might enter a *ne recipiatur*.^f There was formerly a rule in this court, as well as in the Common Pleas, that no cause should be set down for trial, until the record was brought in; but that rule has been departed from in both courts, for the convenience of suitors: Parties often set down their causes before the records are brought in; and it frequently happens, that the causes are compromised, before they proceed to the length of carrying in the record.^g At present, by a late rule of the King's Bench, "all causes to be tried at the sittings after term, must be entered, and the records delivered to the marshal, at the times following: viz. the causes in *Middlesex*, the first day of the sitting after term in *Middlesex*; and the causes for *London*, two days before the adjournment day in *London*."^h Special jury causes are appointed for particular days: And, in term time, the rule for a special jury must be served a reasonable time before the day of trial.ⁱ At the sittings after term, it is a rule, that "no cause shall be tried by a special jury in *Middlesex* or *London*, unless the rule for such jury be served, and the cause marked in the mar- [*871] shal's book *as a special jury, on or before the day preceding the adjournment day in *Middlesex* and *London* respectively."^k

In the Common Pleas, it appears to have been formerly a rule, that records of *nisi prius* in *London* and *Middlesex*, should be entered in the marshal's book, two days at least exclusive before the day of trial, according to the ancient course; or in default thereof, a *ne recipiatur* might be entered:^l and accordingly it was holden, that in *London* and *Middlesex*, *ne recipiatur* might be entered, after eight o'clock in the evening, the day next but one before the day of sitting.^m Afterwards the practice was, that no record or writ of *nisi prius* would be received at any sitting after term in *Middlesex*, unless the same was delivered to and entered with the marshal, within two days after the last day of every term; nor at any sitting after term in *London*, unless the same was delivered to, and entered with the marshal, the day before the day to which the sitting in *London* should be adjourned.ⁿ But now the rule is, that all records of *nisi prius* for the sittings after term, in *London* and *Middlesex*, shall be passed with the clerk of the treasury, and the causes entered with the marshal, two days at least before the adjournment day; and in default thereof, the defendant may, after eight o'clock in the evening of the second day preceding

^f R. M. 4 Ann. (a). K. B.

^g 1 Dowl. & Ry. 181. per Abbott, Ch. J.

^h R. H. 34 Geo. III. K. B. and see *Notice*, M. 17 Geo. II: K. B.

ⁱ 2 Barn. & Ald. 400. 1 Chit. Rep. 234. S. C. *Ante*, 844.

^k R. T. 30 Geo. III. R. H. 44 Geo. III. K. B. 10 East, 1. 2 Camp. *Introd.* XII.

^l R. E. 1 Jac. II. reg. 2. C. P. and see

N. H. 8 Geo. I. § 2. C. P. but see R. M. 1654. § 21. C. P. by which it appears that the ancient course, in *London* and *Middlesex*, was to enter causes in the marshal's book, four days before the trial.

^m Cas. Pr. C. P. 37. N. H. 8 Geo. I. § 2. n. C. P.

ⁿ N. E. 2 Geo. III. C. P. Barnes, 494.

the adjournment day, enter a *ne recipiatur*:^a which in effect restores the old practice. And it is also a rule, that no cause can be tried by a special jury in *Middlesex* or *London*, unless the rule for such special jury shall be served, and the cause marked in the marshal's book as a special jury cause, *two* days previous to the adjournment day, in *Middlesex* or *London* respectively.^p In the Exchequer it is a rule,^q that "all causes to be entered for trial in *London* and *Middlesex*, shall be entered as follows, that is to say, if notice of trial shall be given at any sitting within term, *two* days before the day of sitting; and if at a sitting after term, before *eight* o'clock in the evening of the day before the *first* day of such sitting, or before *eight* o'clock in the evening of the day before the day on which such sitting shall be adjourned; and that if the same shall not be so entered for such sittings respectively, a *ne recipiatur* may be entered."

*At the *assizes*, it is a rule, that the writ and record [*872] shall be entered together.^r And, by an order of all the judges, "no writ and record of *nisi prius* shall be received, in any county in *England*, unless they shall be delivered to, and entered with the marshal, before the first sitting of the court after the commission day, except in the county of *York*; and there the writs and records shall be delivered to and entered with the marshal, before the first sitting of the court on the second day after the commission day, otherwise they shall not be received."^s The court will not allow a cause to be entered for trial, with the marshal, after the regular time, though there be no *ne recipiatur* entered by the defendant.^t And both in *London* and *Middlesex*, as well as at the *assizes*, every cause shall be tried in the order in which it is entered, beginning with *remanets*, unless it shall be made out to the satisfaction of the judge in open court, that there is reasonable cause to the contrary; who thereupon may make such order for the trial of the cause, so to be put off, as to him shall seem just.^u The court in bank, however, will not give directions as to the order in which a special jury cause shall be tried at *nisi prius*, though the special jury appears to have been obtained for delay.^x But where a cause was set down for the first sittings in term, and the defendant obtained a rule for a special jury, the chief justice directed that the cause should be tried at the second sittings, on a suggestion that the rule was obtained with that view.^y The fact of a cause being set down in the written list of causes at *nisi prius*, is notice to the attorney, that it may be

^a R. H. 32 Geo. III. C. P.

^p R. T. 52 Geo. III. C. P. 4 Taunt. 600.
2 Chit. Rep. 378. *Ante*, 870, 71.

^q R. T. 29 Geo. III. in *Scac. Man. Ex.*
Append. 222, 8 Price, 502.

^r R. T. 10 & 11 Geo. II. K. B. & C. P.

^s R. H. 14 Geo. II. 3 Campb. 365. In this order, there is an exception of the county of *Norfolk*, as well as that of *York*; but by a subsequent order of the judges, in H. 32 Geo. III. the time allowed for delivering and entering writs and records of *nisi prius*, at the *assizes* for the county

of *Norfolk*, or city of *Norwich*, is the same as in other counties. *Man. Ex.* Append. 222, 3. And for the fees payable to the marshal, for putting in the record of *nisi prius* at the *assizes*, see R. E. 13 Jac. I. K. B.

^t 2 Dowl. & Ryl. *Ni. Pri.* 6.

^u R. H. 14 Geo. II. and *Notice*, M. 17 Geo. II. K. B.

^x 1 Chit. Rep. 489. (*a.*) and see 7 Taunt. 390. *Ante*, 846.

^y 1 Chit. Rep. 489. and see *id.* 534.

tried at any time in the course of the day: and therefore, where a cause had been for several days in that list, and was at length tried out of its order, as an undefended cause, in the absence of the defendant's attorney, the court granted a new trial only on payment of costs.^a And where a cause, which stood in the printed paper below the last cause mentioned in the written list, was taken out of its turn, and tried as an undefended cause, the counsel for the defendant objecting thereto, and declining to appear; the court held, [*873] that the trial was regular, and refused a new trial, though *on payment of costs, without an affidavit of merits.^a If a witness be suddenly taken ill, the judge at *nisi prius*, we have seen,^b will order the trial to stand over till a future day in the same sittings, when he is likely to attend, though he will not put off the trial on that ground to a future sittings: Nor will he try a cause out of its order, for the purpose of preventing an injunction in equity, against proceeding to trial.^c And in the Common Pleas it is a rule, that the court will never put off the trial of a cause, upon the consent of the parties or counsel at *nisi prius*; but the plaintiff must either proceed to try, or withdraw his record.^d

The cause being entered, stands ready for trial at the bar of the court, or before the judge at *nisi prius*; And in this stage of the proceedings, or more commonly at the trial, when one or other of the parties is fearful of the event, the matter in dispute is sometimes referred to *arbitration*. This mode of terminating differences will be the subject of the remainder of the present chapter. But it should be observed, that the doctrine of arbitration is not necessarily connected with a suit at law, as it frequently exists where no suit is depending; being a mode of settling disputes, by agreement of the parties to refer them to the decision of one or more indifferent persons as arbitrators.

Arbitrations are of two kinds; first, when there is a cause depending in court; and secondly, when no cause is depending. The submission, in the former case, is either by *rule* of court,^e or judge's *order*,^f before the trial, or by order of *nisi prius* at the trial,^g which may be afterwards made a rule of court; and upon a submission of this kind, the plaintiff usually takes a verdict for his security, particularly when there is special bail, who would not otherwise be liable for the sum awarded. In the other case, the submission is by *agreement* of the parties, which is either in writing, or by parol; or by the positive directions of an act of parliament, as in the case of inclosure acts. After an order of *nisi prius* had been made to refer a cause to arbitration, with the consent of the defendant's counsel and attorney, the court of Common Pleas would

^a 3 Barn. & Ald. 328.

^b 5 Barn. & Ald. 907. 1 Dowl. & Ry.
53. 8. C. and see 2 Chit. Rep. 269.

^c *Ante*, 832, 3.

^d 1 Campb. 559. and see 1 Stark. *Ni*.

Pri. 31. 63.

^e 2 Taunt. 221. *Ante*, 833.

^f Append. Chap. XXXVI. § 13.

^g *Id.* § 14, 15.

^h *Id.* § 16.

not set it aside, on an affidavit by the defendant, expressly denying his attorney's authority to refer; though *the application [*874] was made before any step taken by the arbitrator, except the appointment of a meeting.^b So, after the parties at *nisi prius* had entered into a rule of court, arranging the terms of alternate enjoyment of a watercourse, in which terms the defendant was disappointed of the expected benefit, the court of Common Pleas refused to open the rule, and let the defendant proceed to trial, upon putting the plaintiff in *statu quo*, or on any terms whatever.^c But they amended an order of reference at *nisi prius*, made a rule of court, by inserting such omitted matters as were incident to the substance of the agreement between the parties.^k And where an order of *nisi prius* had been obtained, upon the usual terms of filing no bill in equity, &c. the court permitted it to be amended, by striking out these words; it appearing that a bill in equity was necessary to attain the justice of the case.^l Where an agreement was entered into in the course of a cause, by the parties and a third person, but it was not an agreement to refer matters to arbitration, and the application was not made at the instance of either of the parties, the court of Common Pleas refused to permit the agreement to be made a rule of court, although it contained a provision for that purpose.^m

References made by rule of court having been found to contribute much to the ease of the subject, in the determining of controversies, the parties being obliged thereby to submit to the award, under the penalty of imprisonment, it was enacted by the statute 9 and 10 W. III. c. 15. § 1. that "it shall and may be lawful for all merchants and traders, and others desiring to end any controversy, suit or quarrel, for which there is no other remedy but by personal action or suit in equity, by arbitration, to agree that their *submission* of their suit to the award or umpirage of any person or persons, should be made a *rule* of any of his majesty's courts of record, which the parties shall choose, and to insert such their agreement in their submission, or the condition of the *bond*ⁿ or promise, whereby they oblige themselves respectively, to submit to the award or umpirage of any person or persons; which agreement being so made, and inserted in their submission or promise, or condition of their respective bonds, shall or may, upon producing an *affidavit* thereof made by the witnesses thereunto, or any one of them, in the court of which the same is agreed to be made a rule, and reading and filing the said affidavit in court, be entered of *record in such court; and a *rule* shall thereupon be made by [*875] the said court, that the parties shall submit to, and finally be concluded by the arbitration or umpirage which shall be made concerning them, by the arbitrators or umpire, pursuant to such submission; and in case of disobedience to such arbitration or umpirage, the party neglecting or refusing to perform and execute the same, or any part thereof, shall be subject to all the penalties of contemning

^b 3 Taunt. 486. and see 1 Salk 86. *accord*. 1 Chit. Rep. 193. (a). *ante*, *107. 573.

^c 5 Taunt. 628.

^d *Id.* 662.

^e 4 Taunt. 254. but see 2 Chit. Rep. 29. 5 Moore, 167.

^f 1 Bing. 133.

^g Append. Chap. XXXVI. § 17.

a rule of court, when he is a suitor or defendant in such court, and the court on motion shall issue process accordingly; which process shall not be stopped or delayed in its execution, by any order, rule, command or process of any other court, either of law or equity, unless it shall be made appear on oath to such court, that the arbitrators or umpire misbehaved themselves, and that such award, arbitration or umpirage, was procured by corruption, or other undue means." The intent of this act was to put submissions, where no cause was depending in court, upon the same footing with those where there was a cause depending; and it is only declaratory of what the law was before, in the latter case.^o

This statute, being confined to courts of *record*, does not it seems extend to the court of Chancery:^p And it is also confined to the submission of disputes of a *civil* nature: Therefore, the court will not make a submission to an award a rule of court, where part of the matter agreed to be referred has been made the subject of an indictment.^q And they will not entertain an application for setting aside an award, founded upon an indictment at the assizes, for not repairing a road, though the question in dispute be of a *civil* nature.^r A *parol* submission is not within the statute;^s nor a submission in writing, unless it is agreed to be made a rule of court: But where there is such an agreement, it seems that the court will enforce the execution of a *parol* award by attachment.^t A consent, in the arbitration bond, to make the *award* a rule of court, instead of the *submission*, will it seems warrant the interposition of the court, under this act:^u And where a submission was by bond, and at the end of the condition there was this clause, *and if the obligor shall consent that this submission be made a rule of court, that then, &c.* the court on motion held these conditional words to be a sufficient indication of consent, and made the submission a rule of court.^x [*876] So, *where the agreement to make the submission a rule of court was no part of the condition, but was thereunder written, and not signed; it appearing by affidavit that the subscription was made before the execution of the bond, it was taken by the court to be part of the condition, as an indorsement by way of defeazance is part of the deed; and the submission was made a rule of court.^y An agreement stamp is not necessary to an arbitration bond, though it contain, besides the usual clauses, an agreement respecting the manner in which the costs should be paid.^z

A submission to arbitration, by rule of court, of all matters in difference *between the parties in the cause*, is not confined to the subject matter in the particular action then depending; but will extend to cross demands between the parties, though not pleaded by way of set off; and the costs being to abide the event will make

^o 2 Bur. 701.

^p But see 2 Madd. Chan. 713.

^q 8 Durnf. & East, 520. but see 11 East, 46. 7 Taunt. 422. 1 Moore, 120. S. C.

^r 2 Dowl. & Ryl. 265.

^s 7 Durnf. & East, 1. 6 Moore, 488.

^t Barnes, 54.

^u *Powell v. Phillips*, E. 30 Geo. III. K. B. 3 East, 603. 2 Bos. & Pul. 444. but see 2 Str. 1178. *contra*.

^x 1 Salk. 72. 1 Ld. Raym. 674. S. C.

^y Barnes, 55.

^z 2 Chit. Rep. 40.

no difference.* But a reference of all matters in difference *in the cause between the parties*, is confined solely to the matters in dispute in that particular action. A submission to an award having been made a rule of court, between *A.* and *B.* the parties on the record, which award not having been made in time, the dispute was referred to a second arbitrator, by *B.* and *C.* who were the real parties in the suit, the court would not grant an attachment against *B.* for not obeying the award made by the second arbitrator, because the reference should have been made by the parties on the record; and even if it had, there should have been another rule, to make the second submission a rule of court: And as the court had no jurisdiction in this case, they could not go into the merits, though *B.* consented to waive the objection.^b

It was formerly holden, that a reference to arbitration was an implied stay of proceedings.^c But in the beginning of Queen *Anne's* time, a rule was made, that no reference whatsoever, of any cause depending in the King's Bench, should stay the proceedings; unless it was expressed in the rule of reference, to be agreed, that all proceedings in this court should be stayed.^d And it has been frequently decided, that an agreement to refer all matters in difference to arbitration, is not sufficient to oust the courts of law or equity of their jurisdiction.^e When a reference is pending, and it has been agreed that it shall operate as a stay of proceedings, it may be made the subject of an application to the court for staying the proceedings, "until an award be made."^f But where it appeared doubtful, whether arbitrators had made their award previous or subsequent to their receiving notice of a deed of revocation, the court of Common Pleas would not stay the proceedings; but left the party to plead such matter *puis darrein continuance*.^g

There are several ways however, in which the power of arbitrators may be legally determined: as first, by the *death* of the parties to the submission,^h or any one of them;ⁱ or, if either of them be a feme sole, by her *marriage* before the award is made:^k secondly, by the death of the arbitrators,^l or their not making an award within the *time* limited: thirdly, by their *disagreement*, and refusal to act or intermeddle any further, or by their appointing an umpire to act for them:^m And fourthly, by the *revocation* of the parties; respecting which it is laid down, that although a man be bound in a bond to stand to the arbitrament of another, yet he may countermand or

* 2 Durnf. & East, 645. 2 Saund. 64. (7).

^b 2 Durnf. & East, 643.

^c 1 Mod. 24.

^d 2 Ld. Raym. 789.

^e 8 Durnf. & East, 139.

^f *Ante*, 573.

^g 2 Moore, 30. 8 Taunt. 146. S. C.

^h 1 Marsh. 366. 7 Taunt. 571. 1 Moore, 287. S. C. 2 Barn. & Ald. 394. 1 Chit. Rep. 187. S. C. 2 Barn. & Cres. 345. and see Caldwell on *Arbitration*, 29, 30. but see Barnes, 210. *Bower v. Taylor*, E. 56 Geo. III. K. B. cited in Cald. 30. 7

Taunt. 574, 5. *in notis.*, *contra*; which latter case seems to be now over-ruled.

ⁱ *Edmunds v. Cox*, E. 24 Geo. III. K. B. 2 Chit. Rep. 432. and see 3 Dowl. and Ryl. 184. 2 Barn. and Cres. 345.

^k W. Jon. 388. 2 Keb. 865. 877. 3 Keb. 9. 1 Rol. Abr. 331. tit. *Authoritie*, E. pl. 4. Com. Dig. tit. *Arbitrament*, D. 5. 5 East, 266.

^l 4 Moore, 3.

^m 1 Rol. Abr. 261, 2. 1 Sid. 428. 2 Saund. 129. 1 Lev. 174. 285. 302. 3 Lev. 263. 2 Vent. 113. 1 Salk. 70, 71, 2.

revoke the power of the arbitrator; for a man cannot, by his own act, make an authority, power, or warrant, not countermandable, which by the law and of its own nature may be countermanded:^a But by this countermand or revocation of the power of the arbitrator, the bond is forfeited, and the obligee shall take the benefit thereof.^c And if the plaintiff has covenanted to perform an award, and an award be made, he cannot, by revoking his authority, relieve himself from an action of *covenant*:^d nor will the court in such case set aside the award, because it would deprive the other party of his action.^e Hence it appears, that when the parties execute a deed, or enter into an agreement of reference, they may revoke the authority of the arbitrator, before the submission is made a rule of court; though the party may be liable to an action of *covenant*, for not performing the award. And accordingly, where a cause was referred [*878] to arbitration, *under a judge's order, and one of the parties, before the award was published, and before the judge's order was made a rule of court, revoked the submission, and the arbitrator notwithstanding made an award, the court set it aside, although the judge's order had been made a rule of court, before any application to set aside the award.^f But an order of *nisi prius*, referring a cause to arbitration, not being revocable, may be made a rule of court, after notice of revocation of the arbitrator's authority.^g The court will not set aside an award, on the ground that the party, for whose benefit the money was to be paid, had become *bankrupt*, before the making of the award, where he had previously assigned all his interest in the sum to be awarded, to a third person.^h And where a case was referred by order of *nisi prius*, and after the reference, but before the making of the award, the plaintiff became *bankrupt*; the court of King's Bench held, that this was no revocation of the submission, and that the arbitrator might notwithstanding award a verdict for the defendant.ⁱ

A matter was referred by consent at *nisi prius*, to the three foremen of the jury, and before the award was made, one of the parties served the arbitrators with a *subpcena* out of Chancery, which hindered their proceeding to make the award; the court held this to be a breach of the rule, and granted an attachment *nisi*.^k So, where the parties upon a reference consented to abide by the award, and not to bring any bill in equity, and their submission was made a rule of court, and after an award made, one of them filed a bill in Chancery against the other, the court made a rule absolute for an attachment.^l But where parties by bond agreed to submit matters in difference between them to arbitration, and that the submission should be made a rule of court, it is competent to either, even since

^a 8 Co. 82. and see 7 East, 608. 11 East, 367. 3 Maule & Sel. 145. 5 Taunt. 452. 5 Barn. & Ald. 507. 1 Dowl. & Ry. 106. S. C.

^c 8 Co. 82. T. Jon. 134. and see 5 Taunt. 453. 5 Barn. & Ald. 507. 1 Dowl. & Ry. 106. S. C.

^d 5 East, 266. and see 5 Taunt. 453. 5 Barn. & Ald. 507. 2 Chit. Rep. 316. 1

Dowl. & Ry. 106. S. C.

^e 5 Taunt. 453.

^f 1 Bing. 87.

^g 1 Chit. Rep. 200. 2 Barn. and Ald. 395. S. C.

^h 2 Chit. Rep. 43.

ⁱ 4 Barn. and Ald. 250.

^j 1 Salk. 73.

^k 3 Bur. 1256.

the statute 9 & 10 W. III. c. 15. to revoke by deed his submission, and notify the same to the arbitrators, before the authority is executed; and he cannot be attached for a contempt of court, in not obeying the award, if made *after* such revocation and notice, though the submission be afterwards made a rule of court.* But it seems that it would be a contempt to revoke the submission, after it has been made a rule of court.† When an order of reference however is made at *nisi prius*, with the usual clause, empowering the court to award costs "for affected delay, or otherwise wilfully preventing the arbitrator from making his award," and "one of the par- [*879] ties, after the arbitration has been entered into, revokes the arbitrator's authority, in consequence of being unable to procure the attendance of necessary witnesses, he is not liable to costs within the meaning of the order."‡

When a cause is referred at the trial, it is usual to get the witnesses sworn, before they leave the court; otherwise (if required,) they must be sworn before a judge: And the order of *nisi prius* being obtained from the clerk of *nisi prius* or associate in *London* or *Middlesex*, or from the associate at the assizes, the arbitrator will make an appointment in writing, of a time and place for the parties and their witnesses to attend him; which appointment should be subscribed to a copy of the order of *nisi prius*, and served therewith on the defendant's attorney: And, previous to the meeting, the arbitrators should be furnished with a state of the case, and the names of the witnesses, &c. A similar mode of proceeding is to be observed, when the reference is by agreement without suit.

The arbitration then proceeds: And it has been holden that arbitrators, having power to choose an umpire, may elect one either *before*, or *after* the expiration of the time limited for making their award, so as it be within the time appointed for his umpirage;§ and the arbitrators may elect him, before they enter upon the examination of the matter referred to them.¶ If the bond be, that if arbitrators do not make their award by a certain day, then the parties are to abide the award of an umpire to be chosen by the arbitrators, the time for the arbitrators to appoint an umpire commences when the time for making their award expires.¶ The appointment of an umpire made in writing by two arbitrators, does not it seems require a stamp.¶ And where the parties named two arbitrators, who were to choose a third, and the award was to be made by the three, or any two of them, and each of the arbitrators proposed to the other a third, who was admitted to be a fit person, but not being able to agree which of the two proposed should be selected, they agreed to decide the choice by lot; the court held, that this was within their authority,

* 7 East, 608. 5 Taunt. 452.

† 1 Str. 993. and see 7 East, 608. 5 Taunt. 452. 2 Moore, 30.

‡ 2 Barn. and Ald. 395. 1 Chit. Rep. 204. 8. C.

§ 15 East, 556. And for the form of

the appointment, see Append. Chap.

XXXVI. § 19.

¶ 2 Durnf. & East, 644. and see 2 Saund.

133. (7.)

¶ 4 Taunt. 232.

¶ Id. 704.

† Vide post, p. 896. note (†).

and that an award made by such third arbitrator, in conjunction with the one by whom he had been originally proposed, could not be impeached on that account.[†] So, where the arbitrators had executed their authority, by an effectual appointment of an umpire, who accepted and acted upon the authority so conferred on him, the [*880] court *held his umpirage to be binding, notwithstanding one of the parties afterwards dissented from such appointment.^a And where, by the terms of a reference, the arbitrators were to appoint an umpire, previously to their entering on the consideration of the matters referred, and to make their award before a certain day, or such time as they and the umpire, or any two of them, should appoint; and the arbitrators, before appointing an umpire, enlarged the time for making their award, and afterwards held a meeting, at which the parties attended; the court of Common Pleas held, that the parties being aware of these facts, and having afterwards attended, could not now make any objection, on the ground of the enlargement of the time having been made before the appointment of the umpire.^b But where the parties named two arbitrators, who were to choose an umpire, and each arbitrator named a person to whom the other objected, and they afterwards agreed to decide by lot which should name the umpire, and thereupon the party who won named the person to whom the other had previously objected; the court held, that the award made by such umpire was bad.^c

If the arbitrators cannot make their award within the time limited by the rule of court, or order of *nisi prius*, a rule may be obtained, by *consent*, but not otherwise,¹ for enlarging it; or where the submission is by agreement without suit, the time may be enlarged by *consent* of the parties.^m And if an arbitrator has power to enlarge the time for making his award to any other day, he may enlarge it more than once.ⁿ Where the parties, by an indorsement in general terms on the bond of submission to arbitration, agree that the time for making the award shall be enlarged, such agreement virtually includes all the terms of the original submission, to which it has reference, and amongst others, that the submission for such enlarged time shall be made a rule of court; and consequently the party is liable to an attachment for non-performance of an award made within such enlarged time, under the statute 9 & 10 W. III. c. 15.^o And

^a 16 East, 51.

^b 11 East, 367.

^c 8 Taunt. 694.

^m 2 Barn. & Ald. 218.

ⁿ *Treadale v. Atkins*, M. 21 Geo. III. K.B. *contra*: and see 8 East, 13.

^o Append. Chap. XXXVI. § 20.

^p 1 Taunt. 509. 4 Taunt. 658. S. P. 2 Chit. Rep. 45.

^q 5 East, 189. 8 Duraf. & East, 87.

† A cause was referred to two arbitrators, one named by each party, and to such third person as should be chosen by the other two referees, the award of any two to be binding. The arbitrators, not concurring in the appointment of the third, agreed that each should name one person, and that they should then toss up for choice. The plaintiff's arbitrator having won, appointed his own nominee, and the award being made in favour of the plaintiff by these two, the court of K. B. set it aside, on the ground that this mode of appointing the third arbitrator was improper. *5 Dougl. & Ryd.* 263. And so the case quoted by Mr. Tidd and referred to at letter k. above.

where a cause was referred under a judge's order, with a *proviso* that the arbitrator should make his award on or before a day certain, but if he should not be then prepared, that the time should be enlarged from time to time as he might require, and a judge of the court might think reasonable and just; the court of King's Bench, held, that the time *for making the award was daily en- [*881] larged, by the arbitrator indorsing on the order, on the day preceding the expiration of the original time, that he required further time; although the judge's order granting such further time, was not obtained until a day subsequent.¹ But where, in a similar case, the indorsement was dated on a day subsequent to the expiration of the time originally given for making the award, that court discharged a rule *nisi* for an attachment, for non-performance of the award.² The rule or order for enlarging the time for making an award, when necessary, is drawn up by the clerk of the rules in the King's Bench,³ or secondaries in the Common Pleas, on a brief or motion paper, signed by the counsel or serjeants on both sides, and a copy of it served, with an appointment thereon; but before this rule can be obtained, a motion must be made, for making the order of *nisi prius* or agreement a rule of court.

It will next be proper to consider the *award*,⁴ or *umpirage*; and the mode of enforcing it, by the party in whose favour it is made, or of setting it aside by the opposite party. When a cause is referred to three persons, and they, or any two of them, are empowered to make an award, an award made by two of them is good, if the third had notice of the meetings, &c.; but otherwise such award is bad.⁵ And where a submission was to two, so as they made their award on or before a day certain, but if they did not by the time aforesaid make their award, then to an umpire, provided he made his award on or before a subsequent day, and the arbitrators finally disagreed before their time expired, and declared they would not make any award, and did not make any; the court of King's Bench held, that the umpirage might be made after the final disagreement of the arbitrators, before the time allowed them had expired.⁶ And it need not state that the arbitrators had disagreed.⁷ An award which is required to be made in writing, &c. and *ready to be delivered* at a particular time, is complete, if made in writing, and *ready to be delivered* by the arbitrator within the time, though not actually delivered.⁸ But an arbitrator or umpire having once made his award, is *functus officio*: Therefore, after an award made under the hand of an umpire, and ready for delivery, pursuant to the terms of reference, of which notice was given to the parties, an alteration by the umpire of the sum awarded, though made on the same day, and before delivery of the *award, is void; but the [award [*882] was held to be good for the original sum awarded, which was still legible, the same as if such alteration had been made by a mere

¹ 1 Maule & Sel. 1.

² *Good v. Wilks*, H. 56 Geo. III. K. B.

³ Append. Chap. XXXVI. § 21.

⁴ For the forms of *Awards*, see Append.

Chap. XXXVI. § 22, &c.

⁵ *Willea*, 215. *Barnes*, 57. S. C.

⁶ 3 Maule & Sel. 559.

⁷ 5 Maule & Sel. 193.

⁸ 4 East, 584. 6 East, 310.

stranger, without the privity or consent of the party interested.^a The award of an umpire however is not vitiated, by the two arbitrators, who were *functi officio*, nor by a stranger's joining in it.^a

It was not formerly necessary that an award in writing, though under seal, should have a deed stamp, unless it was delivered *as a deed*; for if it was only delivered as an *award*, it was sufficient if it had the award stamp of *ten shillings*.^b But this distinction is now rendered immaterial: for, by the last general stamp act,^c an award, whether under hand and seal or under hand only, is subject, like a deed, to the stamp duty of 1*l.* 15*s.*; and where the same, together with any schedule or other matter put or indorsed thereon, or annexed thereto, shall contain 2,160 words, being *thirty* common law sheets, or upwards, then for every entire quantity of 1,080 words, or *fifteen* common law sheets, contained therein, over and above the first, 1,080 words, a further *progressive* duty of 1*l.* 5*s.* Where several underwriters on a policy, however, enter into an agreement to refer the cause to arbitration, that agreement and the award require each but one stamp; there being a community of interests between the parties in the subject matter.^d

The general requisites of an award are, that it be certain, mutual, and final.^e But certainty to a common intent is sufficient.^f And an award that two persons shall pay a debt, in proportion to the shares which they held in a certain ship, the *ratio* of their shares not being a subject of dispute, is sufficiently certain.^g An award that money shall be paid to a stranger, for the use of one of the parties to the submission, is good.^h And an order of *nisi prius* referring an action of *debt* on a money bond, (where the issue was payment by a co-obligor,) *and all matters in difference*, to arbitration, does not require the arbitrator to direct for what sum the verdict shall be entered; and the court refused to set aside an award, directing the verdict to be entered generally for the plaintiff, on a suggestion that the arbitrator ought to have directed for what sum the verdict and judgment should be entered, and execution taken out, without proof that there were other matters in difference between the parties.ⁱ An award which settles the costs on both sides, is final.^j as is also an award that certain actions be *discontinued*, and each party pay his own costs; this being in effect an award of a *stet processus*.^k So where an action of *covenant* was referred, with all matters in difference, to arbitration, and the costs of suit were directed to abide the event; the court held, that an award that the [*883] plaintiff had no demand on the defendant, on account of any alleged breaches of covenant, or on any other account whatsoever, was

^a 6 East, 309. 2 Smith R. 400. S. C. and see 8 East, 54. 11 East, 369.

^b 4 Taunt. 232.

^c 4 East, 584.

^d 55 Geo. III. c. 184. *Sched.* Part I. and see the statute 48 Geo. III. c. 149. *Sched.* Part II. § III.

^e 6 Taunt. 171. 1 Marsh. 525. S. C.

^f See Bac. Abr. tit. *Arbitrament*; *Kyd* on Awards; and 1 Saund. 327. (2.)

^g 1 Bur. 274. and see 7 Durnf. & East, 76.

^h 6 Taunt. 254.

ⁱ 2 Chit. Rep. 43.

^j 3 Dowl. and Ryl. 224. and see 2 Barn. and Cres. 170.

^k Forrest, 73. and see 2 Dowl. and Ryl. 222.

^l 9 East, 497.

final, although the suit was not in terms put an end to.^m And an arbitrator, to whom all actions and causes of action, and all matters in difference in two actions between the parties, have been referred, is not compelled to take matters of an equitable nature into consideration; but an award made by him, in reference to the two actions only, is final.ⁿ But notwithstanding the award be final, as to all matters referred and decided upon by the arbitrators, yet upon a reference of all matters in difference between the parties, an award does not preclude the plaintiff from suing for a cause of action existing against the defendant at the time of the reference, upon proof that the subject matter of such action was not laid before the arbitrators, nor included in the matters referred.^o An award between a lessee and his neighbour, awarding an act to be done for the benefit of the latter by the lessee, which would be waste upon the estate of the lessor, is bad.^p An award, however, may be good in part and bad in part,^q provided the latter be independent of and unconnected with the former.^r

When a cause is depending, the submission is either silent with regard to costs, or they are directed to abide the event of the award, or else to be in the discretion of the arbitrator. The power of awarding costs is necessarily consequent to the authority conferred upon the arbitrator, of determining the cause; and the reason why, in references of this sort, a provision is frequently inserted, that the costs shall abide the event of the award, is that the arbitrator may not have it in his power to withhold costs from the party who is in the right: But that is to be considered as the restriction of a power, which he would otherwise necessarily have, of allowing costs at his election.^s Therefore, where a cause and all matters in difference were referred to an arbitrator, but nothing was said about costs, the court held, that the arbitrator had power over the costs of the cause,

^m 5 Barn. and Ald. 861. and see 2 Barn. and Cres. 107. 8 Taunt. 697.

ⁿ 7 Taunt. 644. 1 Moore, 403. S. C. but see 16 East, 58. 2 Moore, 723.

^o 4 Durnf. and East, 146. 4 Esp. Rep. 180. but see Willes, 268. 7 Mod. 349. *oct.* S. C. 1 Barn. and Ald. 106.

^p 5 Taunt. 454.

^q 2 Wils. 267. 293. and see 3 Lev. 413.

^r Willes, 62. 66. 253. Forrest, 73. 8 East, 13. 445. 8 Taunt. 697. and see 2 Saund. 293. a. (1.) but see 2 Chit. Rep. 494.

^s 2 Durnf. and East, 644, 5, Forrest, 77. but see Willes, 62.

† An award should also pursue and be agreeable to the submission. There is a class of cases, upon awards, in which arbitrators have been held to more than ordinary strictness, in pursuing the terms of the submission, and in awarding upon the several distinct matters submitted, upon the ground of this submission being conditional, *ita quod*. But the rule is to be understood, with this qualification; that in order to impeach an award made in pursuance of a conditional submission, on the ground of part only of the matters in controversy having been decided, the party must distinctly shew, that there were other points in difference, of which express notice was given to the arbitrators; and that they neglected to determine them. 1 *Peters' Rep. S. C. U. S.* 227.

It is a settled rule in the construction of awards that no intendment shall be indulged to overturn an award, but every intendment shall be allowed to uphold it. *Id.* 228. If a submission be of all actions real and personal, and the award be only of actions personal, the award is good; for, it shall be presumed, that no actions real were depending between the parties. *Id. ibid.*

being a matter in difference, though not mentioned in the submission.¹ Upon a submission by bond, however, of all matters in difference between the parties in a cause, without making any mention [*884] of costs, the "arbitrator has no authority to award costs, as between attorney and client:"² and it has been decided, that arbitrators cannot award the costs of the reference, unless power be expressly given to them for that purpose.³ So, where all matters in difference are referred to arbitration, except the costs of the *action*, and no notice is taken of the costs of *reference*, the latter are not in the discretion of the arbitrator.⁴ If no directions be given respecting the costs of an *award*, they are to be paid by both parties equally.⁵

When the costs are directed to abide the *event*, that must be taken to mean the *legal* event: Therefore, where an action of *trespass* was brought for pulling down the plaintiff's gates, and assaulting him, and the defendants pleaded not guilty to the whole declaration, and justified as to all the counts but one, under different rights of way; and the arbitrator awarded a right of way to the defendants, different from any of those set forth, and gave *five* shillings damages to the plaintiff for the assault, as having been committed when the defendants were attempting to exercise a right of way, negatived by the arbitrator; the court held, that the plaintiff could recover no more costs than damages, the award of the arbitrator not being tantamount to a judge's certificate, under the 22 & 23 *Car.* II. c. 9.⁶ So, where the arbitrator found no damages for the plaintiff, in an action of *trespass* to land, and directed both parties to pay their own costs, it was holden that the plaintiff was not entitled to costs, because the legal event of the reference would not carry them.⁷ So, where a cause is referred to arbitration, and the costs are to abide the event of the award, the defendant is entitled to them, if it appear by the award, that the plaintiff's demand was originally under *forty* shillings, and he might have recovered it in a court of conscience:⁸ But where the arbitrator in such case awards something to be done, which proves that the event in fact is in favour of the plaintiff, he is entitled to costs; although the arbitrator do not award a verdict to be entered for him.⁹ And an arbitrator, under a rule of reference which directs that the costs of the cause shall abide the event, has no power to direct those costs to be set off against the costs in a prior [*885] cause; although all matters in difference are referred: "But the award is not to be set aside entirely on that account, but only that part which is incorrect."¹⁰ If a cause be referred to arbitration, under an order of *nisi prius*, but a verdict be nevertheless taken for the plaintiff for a certain sum, as a security for what shall be

¹ 1 Barn. and Cres. 277.

² 12 East, 165. and see 2 Chit. Rep. 157. but see Forrest, 73 *semb. contra.*

³ Willes, 62. Forrest, 73. 2 Chit. Rep. 157. 1 Barn. & Cres. 277.

⁴ 7 Taunt. 213. 2 Marsh. 524. S. C.

⁵ 1 Taunt. 165. 2 Chit. Rep. 157. (a). but see 1 Bing. 269.

⁶ 3 Durnf. & East, 138.

⁷ 1 Chit. Rep. 183.

⁸ 3 Durnf. & East, 139. *Butler v. Grubb*,

H. 23 Geo. III. K. B. *Watson v. Gibson*, H. 33 Geo. III. K. B. *Harrison v. Slater*, T. 44 Geo. III. K. B. and see 13 East, 161. 1 Marsh. 234, 5. 5 Maule & Sel. 196. 2 Chit. Rep. 156. And for the form of the rule, see 2 Chit. Rep. 157.

⁹ 1 Smith R. 426. and see 1 Barn. & Ald. 670.

¹⁰ 1 Chit. Rep. 526. and see 8 Taunt. 526, 7.

awarded to be paid to him, *and costs*, the arbitrator cannot award a sum to be paid to the plaintiff *without costs*; because, by the terms of the order, he was precluded from entering at all into the question concerning costs.^f And where, by the rule of reference, the costs are to abide the event of the award, that includes the costs of the reference, as well as of the cause.^g An action of *ejectment* was referred to arbitration, the reference stating, that if the arbitrator should award that the plaintiff had any cause of action, he should have costs, as in a court of law; and the arbitrator having, by his award, directed the defendant to deliver up the premises, and pay the costs of the action, and a sum of money to the plaintiff for the loss of rent, during the time the defendant held possession; the court of Common Pleas, on a motion for an attachment for non-payment of the costs and sum awarded to the plaintiff, held that the award was in that respect good, although the arbitrator did not find in terms, that the plaintiff had any cause of action.^h

When the costs are left to the *discretion* of the arbitrator, he may either award a *gross sum* to be paid for costs;ⁱ or he may award that one of the parties shall pay to the other, costs *to be taxed by the master*, or *prothonotaries*;^k or he may award costs *generally*, in which case the master or prothonotaries shall tax them.^l And when an arbitrator, authorized to tax costs in a cause, has allowed an *item* which it is insisted ought not to have been charged, the court of King's Bench will not refer it to the master.^m But he cannot award that one of the parties shall pay to the other, such costs as two persons named in the award, but not officers of the court, shall appoint; for this is an improper delegation of his authority.ⁿ And where a special jury having been obtained, on the motion of the defendant, the cause was referred, and by the order of the reference the costs of the cause were to abide the event, and the costs of the reference and ^oof the special jury were left in the discretion [*886] of the arbitrator; the court held, that the arbitrator could not, after directing a verdict for the plaintiff, award that the latter should pay the costs of the special jury.^o If an arbitrator award costs, to be taxed by the master, such costs shall be taxed as between party and party, and not as between attorney and client.^p And it is settled, that an arbitrator cannot award any other than the common costs, as between party and party, unless he be expressly authorized so to do.^q Under a submission to arbitration of two assaults; for one of which the defendant had been indicted and convicted at the Quarter sessions, and of all costs incident to the indictment and subsequent

^f Say. Costs, 177.

^g 9 East, 436. but see Barnes, 123. Pr. Reg. 103. S. C. *semb. contra*. In that case however, it does not appear that the costs were expressly directed to abide the event of the award.

^h 8 Taunt. 697.

ⁱ Cas. temp. Hardw. 53.

^k 1 Salk. 75. 6 Mod. 195. S. C. 7 Durnf. & East, 77. and see 2 Dowl. & Ry. 222.

^l 2 Str. 737. S. Rep. 240. Barnes, 56.

58. and see Hullock on Costs, 418, 19. Willea, 62.

^m 1 Chit. Rep. 38.

ⁿ Cas. temp. Hardw. 181. 2 Str. 1025. S. C.

^o 1 Barn. & Ald. 663.

^p Cas. temp. Hardw. 161.

^q Cowp. 127. Cas. Pr. C. P. 69, 70. 2 Blac. Rep. 953. 12 East, 167. but see Forrest, 73. *semb. contra*.

proceedings thereon, the arbitrator having awarded a payment in satisfaction of all costs incident to the indictment, and *previous* as well as subsequent proceedings thereon, &c. the court of Common Pleas held, that he had not thereby exceeded his authority:⁷ And, on a submission to arbitration under an order of *nisi prius*, the arbitrator may award costs *subsequent* to the order; but where the submission is by bond, he cannot award subsequent costs.⁸ If an arbitrator appointed under an order of *nisi prius*, only award costs to be taxed generally, the costs of the reference ought not to be allowed on the taxation, but merely the costs of the suit:⁹ Neither will an award that one party shall pay to the other, the costs by him sustained [in the action, include the costs of the reference.¹⁰ An arbitrator cannot it seems, without authority, charge a certain sum for his own expenses.¹¹ If he award an excessive sum to be paid to himself, the court of Common Pleas will refer it to the prothonotary to reduce it:¹² And where he directs the payment of the costs of the award generally, without fixing the amount of them, it is doubtful whether the award is bad in that respect for uncertainty, or whether the amount may not be taxed by the officer of the court.¹³ [*887] When the cause goes off upon an ineffectual arbitration, and is afterwards tried, costs are allowed as upon a *remanet*.¹⁴

The mode of enforcing an award, by the party in whose favour it is made, is by *action*: or, when the submission is made a rule of court, by *attachment*;¹⁵ and, if a *verdict* has been taken for the plaintiff's security, by entering up *judgment* thereon, and taking out *execution*. Upon a submission being made a rule of court, it was formerly holden, that the party might proceed both by action and attachment, at the same time;¹⁶ but a different doctrine has been since laid down:¹⁷ and accordingly, in a late case, the court of Common Pleas would not grant an attachment for non-performance of an award, pending an action brought upon it; nor would allow the plaintiff to waive the action, in order to apply for an attachment.¹⁸

When the submission is by deed with a penalty, and the award is made within the time limited, an action of *debt* lies upon the deed, for the non-performance of the award; and that, whether the award be for the payment of money, or the performance of a collateral act. But where, in an arbitration bond, a time was limited

⁷ 7 Taunt. 422. 1 Moore, 120. S. C.

⁸ Pr. Reg. 45. Barnes, 58. Forrest, 73. but see 9 East, 436. 12 East, 167. And if arbitrators award the defendant to pay the plaintiff his costs of suit, to be taxed by the proper officer before a particular day, it is the business of the *defendant* to have them taxed before that day; Willes, 62. 12 East, 438. and if he do not, the *plaintiff* it seems may proceed to have them taxed *ex parte*. 1 Campb. 253.

⁹ Barnes, 123. 1 H. Blac. 223. 1 Bos. & Pul. 34.

¹⁰ 1 H. Blac. 223.

¹¹ 8 East, 13. and see 4 Esp. Cas. *Ni. Pri.* 47. 2 Chit. Rep. 157. but see 1 Gow,

7, 8. and the cases there cited, by which it seems, that an arbitrator may recover a compensation for his trouble.

¹² 3 Taunt. 461. 5 Taunt. 342.

¹³ 4 Taunt. 658.

¹⁴ 5 Bur. 2694. Say. Costs, 179. S. C. *Sparrow v. Turton*, T. 7 Geo. III. C. P. Say. Costs, 178. 2 Ed. but see Cas. Pr. C. P. 138. Pr. Reg. 103. Barnes, 123. S. C. Doug. 437. 3 Durnf. & East, 507. 6 Durnf. & East, 71. 131. 144. 1 H. Blac. 639.

¹⁵ 1 Salk. 83.

¹⁶ *Id.* 73.

¹⁷ Andr. 299. Cas. temp. Hardw. 106.

¹⁸ 1 Bos. & Pul. 81.

for the arbitrator to make his award, and such time was afterwards enlarged by mutual consent, it was holden that no action could be maintained on the bond, to recover the penalty for not performing the award, made after the time first limited:^f In such case, the plaintiff should have proceeded by action of *debt* or *assumpsit*, on the submission implied in the agreement, to enlarge the time. In a subsequent case, however, where in debt on bond conditioned for the performance of an award, to be made within a limited time, the declaration, after setting out the condition, stated that before that time expired, the parties to the bond, by deed, agreed to give the arbitrators further time for making the award, and that an award was made within the extended time, and alleged non-performance; the court held, upon demurrer, that the action was maintainable upon the bond.^g An action of *debt* also lies upon a submission by deed, without a penalty, or upon a submission in writing without deed, or by *parol*, when the award is for the payment of money; but when it is for the performance of a collateral act, the plaintiff should proceed by action of *covenant* upon the deed, or, if the submission be without deed, by action of *assumpsit*.^h And when matters in dispute are referred to arbitration without bond, and the arbitrators award a certain sum to be due, it may be recovered under a count on an *instimul computassent*.ⁱ Two several tenants of a farm agreed with the succeeding tenant, to refer certain matters in difference respecting the farm to arbitration, and jointly and severally promised to perform the award; the arbitrator awarded each of the *two to pay a certain sum to the third; and the [*888] court held, that they were *jointly* responsible for the sum awarded to be paid by each.^k In an action on an award, made under a judge's order, to prove the order, it is sufficient to put in an office copy of the rule, making it a rule of court.^l

When the submission is by rule of court originally, or by order of *nisi prius* or agreement, which is afterwards made a rule of court, the party disobeying an award is not only liable to an action, but also to an attachment, as for a contempt.^m The court of Common Pleas will grant an attachment against a party for non-performance of an award, which has been made a rule of court, though he reside out of the jurisdiction of the court.ⁿ And where the original award was lost, the court, on a proper affidavit, granted an attachment upon a copy of it.^o But an attachment cannot be granted against a peer of the realm, or member of the house of commons, for non-payment of money pursuant to an award.^p If an arbitrator award, among other things, that each party shall pay a moiety of the costs of the arbitration, and of making the submission a rule of court, and one party, in order to get the award out of the hands of the arbitrator, pay the whole; it seems that he may have

^f 3 Durnf. & East, 592. *in notis*. In that case, however, it did not appear that the consent to enlarge the time was by deed. 2 Barn. & Cres. 185. 188.

^g 2 Barn. & Cres. 179.

^h 2 Ld. Raym. 1040.

ⁱ 1 Esp. Rep. 194. but see *id.* 377.

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^k 7 Durnf. & East, 352.

^l 4 Campb. 17.

^m 1 Salk. 83. and see 1 Saund. 327. c.

ⁿ 1 Bing. 377.

^o 1 Str. 526.

^p 7 Durnf. & East, 171. 448. *Ante*, *218.

an attachment against the other party, if he refuse to pay his moiety.¹ But if, upon the reference of an action in the Common Pleas, the arbitrator award the costs of a nonsuit to be paid by one party, and a larger sum to be paid as a debt by the other, the party awarded to pay the smaller sum is entitled to a set off, without motion; and if payment of the smaller sum be enforced by attachment, the court will set it aside.²

The party having a remedy by action on the award, it is discretionary in the courts, whether or not they will enforce it by attachment: And therefore, where there was a contrariety of evidence, they would not determine it upon affidavits in a summary way.³ So, where the defendant was a *bankrupt*, and incapable of paying the sum awarded, the court refused an attachment for non-payment of it.⁴ And where a party was taken upon an attachment for not performing an award, after which he became bankrupt and obtained his certificate, the court ordered him to be discharged; for this was a demand for which *debt* would lie, and the act says, he shall not be arrested, *prosecuted* or impleaded, for any debt due before the bankruptcy: It would therefore be hard to keep him in custody, when the duty is discharged.⁵ A feme *sole* having agreed to a [*889] reference, ⁶ was awarded to deliver up two notes, and pay a sum of money: she married, and the husband refusing to pay it, it was doubted if the court could grant an attachment against both or either of them.⁷ And where an arbitrator awarded, that A. should fulfil an agreement for the purchase of land of B., and should pay the purchase money on B.'s conveying the land with a good title, the court of Common Pleas refused to grant an attachment against A. for non-performance, on an affidavit that B. had required A. to pay the money, assuring him of his readiness to convey with a good title, without further stating that B. had tendered a conveyance executed.⁸

The court of King's Bench will not grant an attachment against an *administrator*, for not performing a rule of court entered into by the intestate;⁹ and a submission to arbitration by an *executor* or *administrator*, is not of itself holden to be an admission of assets; and therefore, if upon such a submission, the arbitrator simply award a certain sum to be due from the testator or intestate's estate, without saying by whom it is to be paid, the executor or administrator is not personally liable to the payment of the sum awarded, nor can he be attached for the non-payment of it.¹⁰ So *trustees*, by submitting matters to arbitration, do not make themselves personally liable.¹¹ But a submission to arbitration by an executor or administrator, is in general considered as a reference not only of the cause of action, but also of the question, whether or not he has assets: and therefore

¹ 1 Bos. & Pul. 93. *Stokes v. Harris*, M. Ed. 211, 12. 9 East, 318. *Ante*, 230.
² 45 Geo. III. 2 Smith R. 12. S. C. ³ *Anon.* 1 Crompt. 270. and see 6 Durnf. & East, 161.
⁴ 4 Taunt. 632. ⁵ 1 Str. 695. 1 Saund. 327. c. and see 2
⁶ 1 Str. 695. 1 Saund. 327. c. and see 2
⁷ Dowl. & Ryl. 222. ⁸ 6 Taunt. 561. 2 Marsh. 176. S. C.
⁹ *Anon.* K. B. 1 Crompt. 270. ¹⁰ Willes, 315.
¹¹ 2 Str. 1152. and see 7 Price, 209. but ¹² 5 Durnf. & East, 6.
 see the case *ex parte Sneape*, Co. B. L. 7 40. ¹³ 3 Esp. Rep. 101. but see 2 Chit. Rep.

if an arbitrator, under a reference between A. and B. administrator, award that B. shall pay a certain sum as the amount of A.'s demand, B. cannot afterwards object that he had no assets; for this is equivalent to determining, as between these parties, that he had, and therefore he may be attached for non-payment.^c So a reference to arbitration, of all matters in dispute, by assignees of a bankrupt, and a consequent award to pay a sum of money, is conclusive upon them as to assets.^d A *foreign* attachment in *London*, if properly pleaded, is a good bar to an action on an award,^e or on a bond conditioned for its performance;^f but it is no answer to an attachment for non-payment of the sum awarded.^g

*Before any application is made for an attachment, or to [*890] set aside an award,^h the submission must be made a rule of court,ⁱ if not one already; which is done on an affidavit, by one of the witnesses, of the due execution of the bond or agreement containing the submission;^k and if he refuse to make it, the court will compel him.^l The motion for this purpose is a motion of course, in the King's Bench, requiring only counsel's signature; and may be made in vacation:^m but, in the Common Pleas, the rule is moved for in court, and absolute in the first instance.ⁿ And where a matter is referred to arbitrators, by rule of court, and they make their award, the courts will compel a performance of it, as much as if the award were part of the rule; so that a new rule is needless.^o

In order to proceed by attachment, there must be *personal* notice of the award, and a demand of the money, or other thing awarded;^p which demand may be made by the party himself, or by a third person under a power of attorney: And, at the time of demanding it, a copy of the rule must be served upon the opposite party, and of the master's or prothonotary's *allocatur* thereon, if the demand be of taxed costs, and also a copy of the award, and of the power of attorney, if the demand be made by a third person;^q the original rule and *allocatur*, and also the award and power of attorney, when necessary, being at the same time produced and shewn. But personal knowledge of an award, and rule of court, makes the party liable to an attachment for not performing the award, although he has not been personally served.^r After a demand and refusal of the money or other thing awarded, the court, upon an affidavit of the due execution of the award^s and power of attorney, which, in the Common Pleas, should state the time when the award was executed,^t and another, of *personal* service or knowledge of a copy

^c 7 Durnf. & East, 453. and see 1 *Ante*, 601.
Durnf. & East, 691.

^d 2 Rose, 50.

^e 1 Sid. 327.

^f 1 Ld. Raym. 636. 3 Salk. 49. S. C.

^g 4 Durnf. & East, 312. *Grant v. Harding*, *Id.* 313. *in notis*. 1 Crompt. 270. 4 Taunt. 473. 2 Dowl. & Ry. 193.

^h 2 Str. 1178. and see 3 Moore, 64.

ⁱ Append. Chap. XXXVI. § 29.

^k *Id.* § 18.

^l 1 Str. 1. 10 Mod. 322. S. C. Barnes, 58. 1 Price, 308. 1 Chit. Rep. 743. (b.)

^m 5 Barn. & Ald. 217.

ⁿ *Ante*, 491. 493.

^o 1 Salk. 71.

^p *Id.* 83. 12 Mod. 257. 312. *Per* Lord Kenyon, E. 35 Geo. III. K. B. 1 Bos. & Pul. 394. 2 Saund. 186. (1).

^q *Per* Lord Kenyon, H. 38 Geo. III. K. B. but see 2 Blac. Rep. 990. C. P.

^r 1 Barn. & Cres. 264.

^s Append. Chap. XXXVI. § 30.

^t 6 Taunt. 251. 1 Marsh. 580. S. C.

of the rule and award, and of the demand and refusal,^a &c. will in ordinary cases, when the time for making the award has not been enlarged, grant a rule for an attachment *nisi*,² which they will afterwards make absolute, on an affidavit of service, if no sufficient [*891] cause be *shewn to the contrary. But the court will not infer personal service of an award, to bring a party into contempt.³ And where an award appears to have been made out of the time originally given to the arbitrator by rule of court, but which rule reserved to him the power of enlarging the time, it is not enough, for obtaining an attachment for non-performance of the award, that the arbitrator states in his award that he had enlarged the time, without verifying the fact by affidavit; and it should also appear that the defendant had notice of such enlargement, when served with the rule of court.⁴ This notice should it seems be *personally* served; and therefore on a motion for an attachment, for filing a bill in equity contrary to an order of reference, an affidavit that notice of the motion to make the order a rule of court had been served on the party's servant, &c. is not sufficient.⁵ The rule *nisi* for an attachment must also be *personally* served;⁶ and the court of King's Bench will not grant a rule, that service on the defendant's attorney shall be sufficient, although it be sworn that repeated attempts have been made to serve the defendant personally with a copy of the award; but he was not to be found, and although it be suggested that he keeps out of the way, to avoid being served.⁷

In the King's Bench, when the submission to arbitration is by rule of court, or by order of *nisi prius*, there being a cause then depending, the affidavit for an attachment, for disobeying the award, must be entitled in the cause:⁸ and if an affidavit be put into court, without any title, the court cannot take notice of it, though the adverse party is willing to waive the objection.⁹ But when the submission is made a rule of court under the statute, there being no cause depending, the affidavit for an attachment need not be entitled:¹⁰ or it may be entitled "*In the matter, &c.*": though after the rule *nisi* for an attachment is granted, the affidavits in answer to such rule must be entitled "*The King against ———*."¹¹ The affirmation of a *Quaker* has been holden not sufficient to ground an attachment, for the non-performance of an award.¹²

[*892] When a cause is referred at the trial, and a verdict taken for the plaintiff's security, and an award is afterwards made in his favour, the plaintiff may make his election, either to proceed on the

^a Append. Chap. XXXVI. § 31, 2. And for the form of the affidavit in the Exchequer, see Forrest, 80.

² Append. Chap. XXXVI. § 33.

³ 5 Taunt. 813, and see 1 Chit. Rep. 170.

⁴ 15 East, 97. and see 8 East, 13. 1 Marsh. 66. 6 Taunt. 251. 1 Marsh. 579. S. C.

⁵ 1 Marsh. 66.

⁶ *Denman v. Golding*, M. 59 Geo. III. K. B.

⁷ 1 Chit. Rep. 170.

⁸ 5 East, 21. (a.) 12 East, 166. (a.)

⁹ 2 Durnf. & East, 643.

¹⁰ 1 Smith R. 358. 5 East, 21. 12 East, 166. (a.)

¹¹ 12 East, 166. (a.)

¹² 3 Durnf. & East, 601. 5 East, 21. (a.) 12 East, 165. *Ante*, 487a. 499.

¹³ 1 Str. 441. Willes, 291. S. P. *Ante*, 84. but see the cases of *Powel v. Ward*, cited in Andr. 200. and *Taylor v. Scot*, cited in Cowp. 394. 1 Durnf. & East, 266. and the several cases referred to by Mr. *Durnford*, in a very elaborate note on the subject, in Willes, 292. *semb. contra*.

award, by action or attachment, or on the verdict; and in the latter case, he is entitled to sign judgment, and to take out execution for the money awarded, without first applying to the court for leave.^a And when an arbitrator awards damages, without any mention of costs, and directs that execution shall not be taken out for the damages, but that they shall be set off against a counter-demand of the defendant, the plaintiff's attorney may nevertheless take out execution for the costs, which by the rule of reference were to abide the event of the award.¹ But if either party die after the verdict, and before any award is made, the submission is determined, and the arbitrator cannot afterwards proceed to make an award; the death of the party operating as a revocation of his authority.² When a verdict is taken for a certain sum, subject to the award of an arbitrator, to whom all matters in difference are referred by an order of *nisi prius*, he cannot award a greater sum than that for which the verdict was taken;³ and the court will not give leave to increase the sum in the declaration, and rule of reference, on an affidavit that a larger sum will probably be proved before the arbitrator.⁴ If a greater sum be awarded than that for which the verdict was taken, no *assumpsit* by implication will it seems arise, to pay even to the extent of the verdict.⁵ But if judgment in such case be entered for the whole, and it appear that a part of the sum is covered by a counter-demand; which was not a subject of dispute, so that only a balance, less than the amount of the verdict, is ultimately to be paid over to the plaintiff, the court will reduce the judgment to the amount of the verdict, and grant execution for the sum really due.⁶ And although an arbitrator cannot go beyond the amount of the damages in his award in the action, yet when all matters in difference are referred to him, he may it seems make his award for a larger sum as to the additional matters; for which, though the party cannot proceed on the verdict, he may have a remedy under the award.⁷

If a verdict be taken for the plaintiff's security, and the award be made before the term, the defendant, in the Common Pleas, can only *impeach it within the first *four* days of term: and [*893] personal service of the award is not necessary to warrant the issuing of execution, if the attorney for the defendant has been served with a copy of the award.⁸ It has been questioned, whether judgment for a sum of money directed to be paid by an award, reducing a verdict, can be entered before the day on which the payment of the sum is awarded.⁹ But however that may be, execution ought not to be issued for it, before the day of payment.¹⁰ And, in the Com-

^a 1 East, 401. 1 Bos. & Pul. 97. 480.
3 Bos. & Pul. 244. but see 1 Salk. 84.
Barnes, 58. *contra*.

¹ 2 Barn. & Ald. 597. 1 Chit. Rep. 325.
S. C.

² 1 Marsh. 366. 7 Taunt. 571. 1 Moore, 287. 8 C. but see Barnes, 210. *Bower v. Taylor*, E. 56 Geo. III. K. B. Cald. 30.
7 Taunt. 574. 5. *in notis. Ante*, 877.

³ 5 East, 139. and see 1 Taunt. 151.

⁴ 1 Maule & Sel. 675.

⁵ 5 East, 139.

⁶ 1 Taunt. 151.

⁷ 1 Maule & Sel. 675.

⁸ 3 Bos. & Pul. 244. and see 3 Taunt. 45. where the court of Common Pleas permitted judgment to be entered up, though the award was lost, upon an affidavit of its contents.

⁹ 4 Taunt. 319.

¹⁰ *Id. ibid.*

mon Pleas, if the plaintiff recover a verdict for *five* pounds, subject to an order of reference, at *nisi prius*, whether such verdict should stand, or be reduced to *twenty* shillings, and the arbitrator refuse to make an award, the court will not allow a verdict to be entered for the lesser sum, until such order be made a rule of court.* But where a verdict was found for the plaintiff at *nisi prius*, for the damages in the declaration, subject to the award of an arbitrator, who declined proceeding in the reference, the court of King's Bench ordered, that the plaintiff should have judgment and execution forthwith, unless the defendant would consent to refer the damages to another arbitrator.† The court of King's Bench rejected an application to amend the entry of a verdict, according to the notes of an arbitrator to whom the cause had been referred, on the ground that they had no power to compel such notes to be brought before them:‡ And, where a cause has been referred to arbitration, the court cannot interfere to enter a nonsuit against the arbitrators' direction; but the party objecting to the award must move to set it aside.§ An agreement, however, to refer the *quantum* of damages to arbitration, after a question of law has been reserved by the judge at the trial, does not waive an objection to the defendant's liability in the action, after the arbitrator has made his award.¶

At common law, where the submission to arbitration was by rule of court, which was often the case, the conduct of the arbitrators, and of the parties to the submission, might, as it still may, be examined into; and if, on examination, it appeared that the arbitrators had been partial and unjust, or had mistaken the law, the court would not enforce a performance of the award.‡ But where the submission was by bond or other writing, or by *parol*, there was [*894] no other way of impeaching the award, for the misbehaviour of the arbitrators, than by filing a bill in equity.⁴ This was remedied by the statute 9 & 10 W. III. c. 15. § 2. which enacts, that "any arbitration or umpirage, procured by corruption or undue means, shall be judged and esteemed void and of none effect, and accordingly be set aside by any court of law or equity, so as complaint of such *corruption or undue practice* be made, in the court where the rule is made for submission to such arbitration or umpirage, *before the last day of the next term* after such arbitration or umpirage made and published to the parties."⁵ But this statute does not extend to such awards as are made in pursuance of an order of *nisi prius*,⁶ nor to *parol* awards,⁷ which therefore remain as at common law. The court, we have seen,⁸ will not entertain an application for setting aside an award, founded upon an indictment at the assizes, for not repairing a road, though the question in dispute be of a *civil* nature. And a rule was refused on motion, to set aside an award,

* 8 Taunt. 733. 3 Moore, 64. S. C.

† 1 Barn. & Cres. 68. 2 Dowl. & Ryl. 158. S. C.

‡ 1 Chit. Rep. 283. *Ante*, 770. (b.)

§ 1 Marsh. 238.

¶ 2 Dowl. & Ryl. 461.

⁴ 1 Salk. 71. 73. 83. 1 Mod. 21. 2 Bur. 701. 1 Saund. 327. c.

⁵ 1 Saund. 327. b. c.

⁶ Cowp. 23. Barnes, 55.

⁷ 1 Str. 301. 2 Bur. 701. 1 Saund. 327.

(c). 8 East, 466.

⁸ 7 Durnf. & East, 1. 1 Saund. 327. (c). *Ante*, 875.

⁹ *Ante*, 875.

on the ground that the *submission* had been obtained by fraud: the application should have been, to set aside the order of reference.¹

The *grounds* upon which an application may be made to the courts, for setting aside an award, are that there is some objection to its legality, appearing on the face of the award itself, or from the reasons given by the arbitrators in support of it;² or else that there has been some irregularity, as want of notice of the meeting,³ or not hearing the witnesses for both parties,⁴ or collusion or gross misbehaviour of the arbitrators.⁵ And if the application be made in due time, every ground of relief in equity, against an award, is equally open in a court of law.⁶ If a mistake in point of law be made out by clear evidence on one side, which is not denied by the other, the court will set aside the award:⁷ and a mistake in the judgment of the arbitrator is considered as a mistake in point of law.⁸ But partiality and improper conduct in an arbitrator, in making his award, without hearing the defendant and his witnesses, cannot be pleaded in bar to an action on the bond, conditioned for the performance of the award, but is only matter for application to the "equitable [*895] jurisdiction of the court, to set aside the award."⁹ And the court of King's Bench will not set aside an award, on the ground that the arbitrator was mistaken in point of law, unless the principles of law upon which he has decided appear on the face of the award:¹⁰ nor will they refer the matter back again to the arbitrator, on an affidavit that the party had procured new evidence since the reference, unless it be sworn, as in the case of a new trial on the same ground, that there was some surprise, and that it was not such evidence as a reasonable man might have anticipated, or due diligence could have procured.¹¹

It is also a rule, that if the award be good on the face of it, the courts will not enter into the merits at large upon which it is

¹ 2 Chit. Rep. 39. and see 3 Taunt. 378. 432.

² 3 East, 18. and see 6 Taunt. 255. 8 Taunt. 637. 2 Moore, 713. S. C. 1 Chit. Rep. 674. (a).

³ 1 Salk. 71. and see 2 Chit. Rep. 44. (a). 8 Taunt. 694. 4 Moore, 148. but see 3 Atk. 529.

⁴ 1 Bing. 384.

⁵ 3 Atk. 529. 2 Bur. 701. *Sturt v. Moggeridge*, E. 43 Geo. III. K. B. and see 2

Madd. Chan. 714, 15. for the grounds of setting aside an award in equity.

⁶ 3 Bur. 1258, 9.

⁷ *Wade v. Huntley*, T. 28 Geo. III. K. B.

⁸ 8 East, 344. and see 1 Saund. 327. a. (3). 2 Chit. Rep. 44. (a).

⁹ 3 Barn. & Ald. 237. 1 Chit. Rep. 674. S. C. and see the cases referred to in Caldwell on *Arbitration*, p. 53, &c.

¹⁰ 2 Chit. Rep. 42.

† Where an award is void, and nothing can be done upon it without suit, the court will not interfere to set it aside, because such suit must fail. But where a cause is referred by order of N. P., and the arbitrator has power to order a verdict to be entered for either party, and he makes an award, ordering a verdict to be entered; although such award be void, the court will set it aside, for otherwise the party in whose favour the award is made will have judgment upon the verdict without any new proceeding to enforce the award. 5 Barn. & Cres. 384.

‡ So, corruption in the arbitrator is no answer to a motion for an attachment for non-performance of an award, being only a ground for setting it aside. 3 Bing. 167. C. B.

§ The court cannot interfere to alter the terms of an award in order to make them consist with the submission, even where the submission gives minute directions for the course to be pursued by the arbitrators. 2 Bing. 476. C. B.

founded; for if they did, no person, it is said, would ever undertake to be an arbitrator:^a And, in an action to recover the sum awarded, the defendant cannot dispute the validity of the award; his proper course being to apply to the court to have it set aside.¹ It is not sufficient, in order to impeach an award, upon the face of which no objection appears, to state facts from which it may be inferred that the award was founded upon an incorrect notion of the law of the case.² And if the terms of an award be clear upon the face of it, the court will not admit an affidavit of one of the arbitrators to explain their intentions.³ So where a cause, involving a question of law, was referred to a barrister under a rule of court, to settle all matters in difference between the parties, and he made his award thereupon, but the question of law did not appear upon the face of the award; the court, considering that it was the intention of the parties to refer the decision of the merits, as well upon the matter of law as of fact, to the arbitrator, refused to open the award again, upon a suggestion of the arbitrator's mistake in point of law, upon the construction of a contract between the parties.⁷ And though an arbitrator, on a mixed question of law and fact, has allowed transactions apparently illegal, as *premiums* of insurance on a voyage to an hostile port, the court will not set aside the award.⁵ So where an arbitrator, to whom the question of the right of two rectors to the tithe of certain lands was referred, had power to devise all means to prevent future litigation between the parties, and [*896] to settle all matters in difference between *them, and to determine what he should think fit to be done by either of the parties, touching the matters in dispute; the court of Common Pleas held, that he did not exceed his power, by awarding undivided moieties of the tithes to the two rectors.⁶ Even where matter of law alone, and no matter of fact, is referred to a barrister, the court will not set aside an award made by him, on the ground that it is contrary to law, unless the illegality appear on the face of the award.^b And an arbitrator is not bound by a rule of practice, adopted by courts of law for general convenience: Therefore where, on a reference of a Chancery suit, and all matters in difference between the parties, the arbitrator had allowed interest, when it would not have been allowed by a court of law or equity, the court refused to set aside the award on that ground.^c

The courts will not set aside the award of an umpire, because he received evidence from the arbitrators, without examining the witnesses, unless he were required to re-examine them, before the making of his umpirage.^d And where an arbitrator, having by mutual agreement of the parties closed his examination, refused the application of the defendant's attorney for another hearing, and

^a 1 Salk. 71. 1 Str. 301. 3 Atk. 529. 1 Kenyon, 393. 2 Bur. 701. 1 Saund. 327. d.

¹ 1 Gow, 5.

² 1 Taunt. 48.

³ 3 Moore, 241.

⁷ 13 East, 357. 1 Maule & Sel. 105. 5 Maule & Sel. 504. 1 Dowl. & Ryl. 366. accord. but see 1 Brod. & Bing. 89.

⁵ 6 Taunt. 254.

⁶ 3 Taunt. 426. and see 1 Stark. *Ni. Pri.* 209. 1 Moore, 187.

^b 1 Bing. 104.

^c 2 Barn. & Ald. 691.

^d 4 Durnf. & East, 589. and see 1 Bos. & Pul. 91. 175.

made his award; the court of Common Pleas would not set it aside; on the affidavit of the defendant's attorney, that he was in possession of evidence which would repel that on which the award was founded.* So where it was stipulated, that in case of the breach of an agreement, the sum of *one hundred pounds* should be received as a stipulated debt, binding on each party as to the amount; and an action for damages generally, for the breach of this agreement, was referred to an arbitrator, who awarded only *ten pounds* damages; the court held, that in order to entitle the party to move to set aside the award, it was necessary expressly to state in the affidavit, that this clause was pointed out to the arbitrator at the time, and that he was required to act upon it.^f But all the witnesses of the party against whom an award is made, should regularly be examined, and in his presence, if he require it, or it will be a ground for setting aside the award.[†] And an award, in an action for not repairing, made by arbitrators upon view of the premises, without calling the parties before them, may be set "aside."[‡] If an award be made on an [*897] improper stamp, and no application be made to enforce the award, the court will not set it aside.¹ And if an objection to the stamp be not alleged as a ground for obtaining a rule to shew cause to set aside an award, the court will not suffer it to be relied upon afterwards, when cause is shewn.² On a motion respecting an award of commissioners under an inclosure act, the court of King's Bench said: "We may punish upon this, if there be any corruption; or enforce its execution by *mandamus*: but we are not to interpret or set aside these awards, upon complaint of their obscurity,¹ &c." And if, upon a reference, either party is precluded by the terms of the rule from going into evidence of that which he is desirous to try, his remedy is by moving to set aside the rule of reference; but he cannot impeach the award.²

The *mode* of setting aside an award is by application to the court in which the action was depending, when the reference is by rule of court, or order of *nisi prius*; or, if there be no action depending, in the court of which the submission is made a rule under the statute. This application is usually made by the unsuccessful party; but it may be made by the party in whose favour the award is, if it

* 1 Marsh. 404. and see 7 Price, 636.

[†] 2 Barn. and Ald. 704.

[‡] 4 Price, 232.

¹ 2 Chit. Rep. 44.

² 7 Durnf. & East, 95.

¹ *Liddle v. Johnstone*, H. 38 Geo. III. K. B.

² Case on the *Over-Kellet* inclosure act, H. 38 Geo. III. K. B.

³ 3 Taunt. 378.

† The mode of conducting a cause referred must be left to the arbitrators; and if they, after the first or second meeting, exclude both the parties and their attorneys, and examine witnesses privately at the houses of the latter, it seems that such conduct is no good ground of objection, provided it does not proceed from corrupt motives. At all events, if either party would take advantage of it, he must give notice at the time, that he intends to rely on it as an objection; and if he lie by and suffer other meetings to take place, and when the arbitrators are ready to make their award, revokes his submission, he is liable in an action to the other party, who was desirous of having the benefit of the award. 2 *Carring. & Payne, N. P. R.* 574.

appear that a sum has been omitted therein by mistake.* And, unless the application be founded on some objection to the legality of the award, appearing on the face of it, there must be an *affidavit*, stating the grounds upon which it was made; and it is usual to have an affidavit of facts, in answer to the application. When the reference is by rule of court, or order of *nisi prius*, there being a cause then depending, the affidavits in support of, or in answer to the rule for setting aside an award, must be *entitled* in the cause;† but when the submission is made a rule of court under the statute, there being no cause depending, it is not necessary that the affidavits should be entitled:‡ or they may be entitled "*In the matter,*" &c." In the King's Bench, when a rule to shew cause is obtained to set aside an award, the several objections thereto, intended to be insisted upon at the time of making such rule absolute, must be stated in the rule to shew cause.⁴ And in practice it is usual, when a rule for an attachment is moved for, to oblige the party who complains [*898] of the award, to move to set it aside, "unless the objections appear on the face of it; and then both rules come on together." This gives the other side an opportunity of answering the allegations, on which the objections to the award are founded. If a motion for setting aside an award be made on slight grounds, the rule will be discharged with costs.⁵

The courts, we may remember, will not, on the last day of term, hear a motion for a rule *nisi* to set aside an award;⁶ nor can counsel be heard on that day, to shew cause against such a rule, but the same must be enlarged, and made peremptory for the next ensuing term. And when the submission is by bond or other writing under the statute, the application to set aside the award must be made before the last day of the next term after it is made.⁷ So, where the application is to refer back the award to the same arbitrator to re-consider it, on the ground that he had not sufficient materials before him, it must be made within the same time; although the arbitrator be not charged with corruption or undue practice.⁸† But the limitation of time prescribed by the 9 & 10 W. III. for applications to the court to set aside awards, applies only to cases where an original authority is given to the court by that act:⁹ And though the court will in general adopt the same rule, in cases where their authority exists independently of the act, yet when they see suffi-

* 2 Chit. Rep. 44. and see 6 Taunt. 111. by which it appears that the rule should be, either to set aside the award, or to send back the case to the same arbitrator, or to amend the award, by including the sum omitted.

⁴ 5 East, 21. (a.) *Ante*, 891.

⁵ *Id.* 21. 1 Smith R. 358.

⁶ 12 East, 166. (a.) *Ante*, 891.

⁷ R. E. 2 Geo. IV. K. B. 2 Barn. & Ald. 539. 2 Chit. Rep. 376.

⁸ 6 East, 310.

⁹ 2 Chit. Rep. 43.

⁶ *Ante*, 503.

⁷ *Ante*, 894.

⁸ 2 Durnf. & East, 781.

⁹ *Ante*, 894.

† Where an arbitrator who had made his award in the plaintiff's favour, was supposed to have made a mistake in calculating the sum which the plaintiff claimed a right to recover: it was held, that the court could not refer it back to the arbitrator to correct the mistake, without the consent of the defendant. 7 Dowl. & Ryd. 774.

cient reason for their interference, they will interpose their authority, though the time prescribed should have elapsed.^b

The courts will not set aside an award, though for defects appearing on the face of it, after the expiration of the time limited by the statute:^c And a party cannot, in shewing cause against an attachment, impeach the award for any intrinsic matter.^d But, upon an application for an attachment, for non-performance of an award, it is competent to the parties to object to the award, for any illegality apparent on the face of it, although the time limited by the statute, for applying to the court to set aside the award, is expired:^e The reason is, that upon a motion for an attachment, the party would be without remedy, if the attachment were granted, notwithstanding the illegality of the award; whereas if the party were left to his remedy, by bringing his action on the award, it would be competent to the defendant to take advantage of any illegality appearing on the face of it.^f

^b 6 Taunt. 111. 1 Marsh. 471. S. C.

^c *Per Powell, J.* Andr. 297. 1 Kenyon, 118. 1 East, 276. and see Barnes, 55.

^d 6 Durnf. & East, 161. but see 1 Kenyon, 118.

^e 7 Durnf. & East, 73. and see 1 Saund.

327. *c.* Barnes, 56, 7. 1 Kenyon, 118. 11 East, 368, 9.

^f 1 East, 277, 8. *per Lawrence, J.*

CHAP. XXXVII.

OF TRIALS AT NISI PRIUS, AND THEIR INCIDENTS.

IN the present chapter will be considered, as incidents to the trial at *nisi prius*, the briefs for counsel; pleas *puis darrein continuance*; withdrawing the record; challenging and swearing the jurors, and *talesmen*; the order in which counsel are heard at the trial; withdrawing a juror; bills of exceptions, and demurrers to evidence; the nonsuit, or verdict; and, if the verdict be given for the plaintiff in ordinary cases, or for the defendant in *replevin*, the damages found by the jury; special verdicts, special cases, and points reserved; and lastly, the *postea*.

Previously to the trial, a *brief* should be prepared by the attorney for each party, and delivered to counsel; containing a copy or full abstract of the pleadings, a clear statement of the facts of the case, with such observations as occur thereon, and a proper arrangement of the proofs, with the names of the witnesses. The great rule to be observed in drawing briefs, as it is well expressed in a late useful publication,^a consists in conciseness with perspicuity. And though in general the plaintiff has only *two* counsel, yet he may be allowed for fees to *three*, on taxation of costs, in a cause of difficulty.^b

When the cause is called on, the defendant may plead any matter of defence arising after the *last* continuance, or as it is called in French, *puis darrein continuance*, or in Latin, *post ultimam continuationem*: and such a plea may be pleaded, after the jury are gone from the bar; but not after they have given their verdict.^c The last continuance, previous to the sittings or assizes, is the day of the return of the *venire facias*, from whence the plea is continued, by the award of the *distringas* or *habeas corpora*, to the next term, unless the chief justice or judges of assize shall first come on the day of *nisi prius*.^d And on this day, if any matter of [*900] defence has arisen after the *last* continuance, it may be pleaded by the defendant; as that the plaintiff has given him a

^a 1 Sel. Fr. 472. and see Lee's Prac. Dic. 1 V. p. 232. for some useful observations, as to the mode of drawing briefs.

^b 1 Chit. Rep. 544.

^c Doc. pl. 177. *Pearson v. Parkins*, H.

3 Geo. I. Bul. *Ni. Pri.* 310.

^d Bul. *Ni. Pri.* 310. and see Dyer, 361.

2 Lutw. 1143. 1 Blac. Rep. 497. for the time to which the plea is continued.

release, or is bankrupt,^c outlawed, or excommunicated; or that the defendant has become bankrupt, and obtained his certificate;^d or an award made on a reference after issue joined.^e So, in an action against an executor or administrator, a judgment recovered against the defendant, after plea pleaded, for a debt due from the testator or intestate, may be pleaded after the last continuance.^h And it is no answer to such a plea, that the judgment was obtained in an action of *debt* on simple contract, or by confession of the defendant.ⁱ So, it may be pleaded, that a *feme* plaintiff is married, or, in *debt* by an administrator, that the plaintiff's letters of administration are revoked, *puis darrein continuance*.^k But in *ejectment*, the defendant is not allowed to plead a release by the lessor of the plaintiff.^l And where a landlord, with the permission of his bailiff, who had made a distress for rent, commenced an action in the bailiff's name, against the sheriff, for taking insufficient pledges, and the bailiff afterwards, without the landlord's privity, released to the sheriff, who pleaded it *puis darrein continuance*, the court of Common Pleas, we have seen, set aside the plea, and ordered the release to be delivered up to be cancelled.^m So, where husband and wife lived separate under a deed, by which he stipulated that his wife should enjoy, as her separate and distinct property, all effects, &c. which she might acquire, or which by any gift, grant, &c. or representation, she, or he in her right, might be entitled to; and that he would not do any act to impede the operation of that deed, but would ratify all lawful or equitable proceedings to be brought in his or their names, for recovering such real and personal estates; and the wife having, as executrix of *R. M.* commenced an action on a promissory note against defendants, in the names of her husband and herself, the husband released the debt, which release was pleaded *puis darrein continuance*; the court, on application, ordered the plea to be taken off the record, and the release to be given up to be cancelled.ⁿ So, a plea *puis darrein continuance*, of a release by one of several plaintiffs in *assumpsit*, was set aside by the court of King's Bench, without costs, on the terms of indemnifying the plaintiffs, who had released the action, [*901] against the costs of it, although their consent had not been obtained before action brought; it appearing that no consideration had been given for the release, and that the plaintiffs sued as trustees for the creditors of an insolvent person.^o But unless a very strong case of fraud be made out, the court of Common Pleas will not control the legal power of a co-plaintiff to execute a release.^p

If any matters pleadable after the last continuance happen after plea, and before the return of the *venire facias*, they must be

* *Capper v. Stewart*, H. 28. Geo. III. K. B. 15 East, 622.

^f But this it seems must be pleaded specially, and not in the general form prescribed by the statute 5 Geo. II. c. 30. § 7. 6 East, 413. 2 Smith R. 659. S. P. but see 2 H. Blac. 553. 9 East, 82. *Ante*, 696.

^g 2 Esp. Rep. 504.

^h 5 Taunt. 333. 1 Marsh. 70. S. C.

ⁱ 5 Taunt. 665. 1 Marsh. 280. S. C.

^j Bul. Ni. Pri. 309. and see Com. Dig. tit. *Abatement*, T. 24.

^k 4 Maule & Sel. 300. 2 Chit. Rep. 323. S. C. and see 7 Taunt. 9. *Ante*, 732.

^l 7 Taunt. 48. *Ante*, 731.

^m 4 Barn. & Ald. 419.

ⁿ 1 Chit. Rep. 390. *Ante*, 731.

^o 7 Taunt. 421. *Ante*, 731.

pleaded in *bank*. But matters arising after the return of the *venire facias*, may be pleaded either in *bank* or at *nisi prius*.^a And where the defendant had obtained his certificate under a commission of bankrupt, after plea pleaded, and then pleaded it in *bank*, as a matter arising after the last continuance, but in fact another continuance had intervened between the certificate and the plea, the court of King's Bench permitted him to plead it *nunc pro tunc*,^b on payment of costs.^c But matters arising after the trial, and before the day in *bank*, cannot be pleaded *puis darrein continuance*.^d And where, in an action against a member of parliament, two persons became sureties in a bond, conditioned for the payment of such sum as should be recovered, with costs; and the cause proceeded, and notice of trial being given, the defendant filed a bill in equity, and obtained an injunction, pending which he became bankrupt; but having suffered a term to elapse after obtaining his certificate, without pleading it, the court refused to let him plead it as of the former term, *puis darrein continuance*, except on condition of the dismissing his bill in equity, and paying all costs at law and in equity, as between attorney and client.^e So, where notice of trial had been given for the sittings after *Trinity* term, but which was afterwards continued to the first sittings in *Michaelmas* term, and again to the sittings after that term, when the cause was tried, and the defendant had obtained his certificate in the preceding *Trinity* vacation, the court held, that it was too late to plead his certificate *puis darrein continuance*; and they refused to receive such a plea, on the terms of his paying the costs of the trial.^f And a plea of *bankruptcy* in the defendant, after the last continuance, was set aside, as having been pleaded after the proceedings had been stayed in an action on the bail bond.^g

[*902] These pleas are twofold, in abatement, and in bar.^h If any thing happen pending the writ, to abate it, this may be pleaded *puis darrein continuance*, though there be a plea in bar; for this only waives all pleas in abatement that were in being at the time of the bar pleaded, and not subsequent matter; but though it be pleaded in abatement, yet after a former bar pleaded, it is peremptory, as well on demurrer as on trial, because after pleading in bar, the defendant has answered in chief, and therefore can never have judgment to answer over.ⁱ After a plea in bar, if the defendant plead a plea *puis darrein continuance*, this is a waiver of his bar, and no advantage shall afterwards be taken of it:^b Nor can the plaintiff afterwards proceed on the former plea.^d

The great requisite of these pleas is *certainly*:^e and it is not good pleading to say generally, that *after the last continuance* such a thing happened, but the time and place must be precisely

^a 5 Taunt. 333. 1 Marsh. 70. S. C.

^b *Capper v. Stewart*, H. 28 Geo. III. K. B.

^c 2 Smith R. 396.

^d *Richards v. Hinton*, E. 22 Geo. III. K. B.

^e 3 Barn. & Ald. 577.

^f 1 Dowl. & Ryl. 521. 5 Barn. & Ald. 852. S. C.

^g 4 Barn. & Ald. 249.

^h Gilb. C. P. 105. Aleyn, 66.

ⁱ *Id. ibid.* Freem. 252.

^b 1 Salk. 178.

^c *Capper v. Stewart*, H. 28 Geo. III. K. B.

^d Yelv. 141. Cro. Jac. 261. Freem. 112. 2 Lutw. 1143. 2 Salk. 519. 2 Wils. 139.

alleged.^c The form of the plea, if at the assizes, is as follows: *And now at this day, that is to say, on, &c. comes the said C. D. by E. F. his counsel, and says (if in bar), that the said A. B. ought not further to maintain this action against him the said C. D.: because he says, that after the — day of — last past, from which day until the — day of — in — term next, (unless the justices of our lord the king, assigned to hold the assizes of our said lord the king, in and for the county of — should first come on the — day of — at — in the said county of —), the action aforesaid is continued, to wit, on &c. at &c. the said A. B. by his deed, dated &c. did release &c.; and so shew the particular matter.*^f In *abatement*, the plea concludes, by praying judgment of the writ, and that the same may be quashed;^g or, if the writ is abated *de facto*, by praying judgment if the court will further proceed.^h In *bar*, the conclusion of the plea is, that the plaintiff ought not further to maintain his action, and not that the former inquest should not be taken: because it is a substantive bar of itself, and comes in place of the former, and therefore must be pleaded to the action.ⁱ

There are likewise some pleas which may be pleaded at *nisi prius*, that cannot properly be termed pleas *puis darrein continuance*, because the matter pleaded need not be expressly mentioned to have happened after the last continuance; as in *trespass*, that the plaintiff *was outlawed for felony:^k So the defendant may [*903] plead, that a *feme* plaintiff was *covert* on the day of the writ purchased; but he cannot plead that she took *baron* pending the writ, without pleading it after the last continuance: The diversity seems to be, between such things as disprove the writ in fact, and such as disprove it in law.^l

Pleas after the last continuance being productive of delay, are subject to the same sort of restraints as pleas in abatement: they must be verified on oath, before they are allowed;^m and they cannot be amended after the assizes are over:ⁿ There can be but one plea *puis darrein continuance*;^o and such a plea cannot it is said be pleaded after a demurrer.^p But if a plea *puis darrein continuance* be filed, and verified on oath, the courts cannot set it aside on motion, but are bound to receive it:^q And an affidavit referring to the plea, need not be entitled in the cause.^r

^c Bul. *Ni. Pri.* 309. ^d *Id.* 310.

^e Gilb. C. P. 105. 2 Lutw. 1143.

^f 3 Lev. 120. Bul. *Ni. Pri.* 311.

^g Cro. Eliz. 49. 2 Lutw. 1143. Bul. *Ni. Pri.* 310. but see Dyer, 361. *in marg.*

^h Theol. Dig. 204.

ⁱ Bro. Abr. tit. *Continuance*, pl. 57. Bul. *Ni. Pri.* 310.

^j Freem. 252. 1 Str. 493. 2 Smith R. 396.

^k Yelv. 181. Freem. 253. Bul. *Ni. Pri.* 309. but see the case of *Hartley v. Dixon*, M. 29 Geo. III. K. B. 2 Smith R. 639. S. C. where a plea *puis darrein continuance* was amended upon terms.

^l Bro. Abr. tit. *Continuance*, pl. 5. 41. Jenk. 160. Gilb. C. P. 105.

^m 1 Str. 493. cites Moor, 871. and see 1 Ld. Raym. 266. 6 Mod. 9. but see Hob. 81. *contra*. Com. Dig. tit. *Abatement*, I. 24. Chitty on Pleading, 1 V. 635.

ⁿ 2 Wils. 137. 3 Durnf. & East, 554. 5 Taunt. 333. 1 Marsh. 70. S. C. 1 Stark. *Ni. Pri.* 62. but see Jenk. 159. Yelv. 180. and Bul. *Ni. Pri.* 309. where it is said to be in the breast of the judge, whether he will accept such plea or not, that is, whether he will or will not proceed in the trial: And in Say. Rep. 268. a plea *puis darrein continuance* was set aside, because the matter of it arose before the last continuance.

^o 5 Taunt. 333. 1 Marsh. 70. S. C. See

When a plea *puis darrein continuance* is put in at the assizes, the plaintiff is not to reply to it there; for the judge has no power to accept of a replication, nor to try it,* but ought to return the plea as parcel of the record of *nisi prius*;[†] and if the plaintiff demur, it cannot be argued there." When a plea is certified on the back of the *postea*, and the plaintiff demurs, if the defendant, on the expiration of a rule given for him to join in demurrer, refuse to do so, the plaintiff may sign judgment.[‡] And, in order to prevent vexatious delay, the court of King's Bench will order a demurrer to such a plea, to stand for the first paper day in term.[§]

[*904] Previously to swearing the jury, or afterwards by consent of the defendant's counsel, the plaintiff may *withdraw* the record, and by that means prevent the cause from being tried: But this cannot be done by the plaintiff's counsel, until a brief has been delivered to him;[‡] a retainer in a cause, without a brief, not being sufficient.[¶] If the record be not withdrawn, the trial proceeds; and as the jury are called, they may be challenged.

Challenges are of two kinds; first, to the *array*; and secondly, to the *polls*. Challenges to the *array* are at once an exception to the whole panel, in which the jury are arrayed, or set in order by the sheriff in his return; and they may be made on account of partiality, or some default in the sheriff, or his under-officer who arrayed the panel.^b And generally speaking, the same reasons that before awarding the *venire*, were sufficient to have directed it to the coroner or elisors, will be also sufficient to quash the *array*, when made by an officer of whose partiality there is any good ground of suspicion. Also, though there be no personal objection against the sheriff, yet if he array the panel at the nomination or under the direction of either party, this is good cause of challenge to the *array*. Where, upon a challenge to the *array* for unindifferency in the sheriff, on the trial of an indictment for a misdemeanor, the jury panel was quashed; the court held, that the proper course for obtaining a trial of the cause, was to direct new jury process to the coroners of the county, at the instance of the prosecutor, but not without applying to the court specially for that purpose.[¶] And the *venire facias* in such case was held to be properly awarded to the coroner, although two of the special jurymen appeared, and were sworn on the former occasion.^d

Challenges to the *polls*, *in capita*, are exceptions to particular jurors; and, according to Sir *Edward Coke*,[¶] they are of four kinds;

quære; and see 3 Price, 200, 201. *semb. contra*.

* *Capper v. Stewart*, H. 28 Geo. III. K. B.

[†] Yelv. 180. Cro. Jac. 261. S. C. Freem. 252. 2 Mod. 307. S. C.

[‡] 2 Mod. 307. 1 Stark. *Ni. Pri.* 62.

[§] Freem. 252. Bul. *Ni. Pri.* 311. And see further, as to pleas *puis darrein continuance*, when necessary, and the time

and mode of pleading them, Chitty on Pleading, 1 V. p. 634, &c.

^a 1 Stark. *Ni. Pri.* 62.

^b 2 Campb. 487.

^c 3 Taunt. 225.

^d Cowp. 112.

^e 1 Dowl. & Ryl. 145.

^f 2 Barn. & Cres. 104. 3 Dowl. & Ryl. 311. S. C.

^g Co. Lit. 156.

† As to costs on pleas *puis darrein continuance*, *vide post*, p. 1019. (*note*.)

first, *propter honoris respectum*, as if a lord of parliament be impanelled on a jury, in which case he may challenge himself, or be challenged by either party. Secondly, *propter defectum*, as if a juror be an alien born, or a slave or bondman; or have not the necessary qualification of estate. All incapable persons, as infants, ideots, and persons of *non-sane* memory, are likewise excluded upon this ground.^f Thirdly, *propter affectum*, as that a juror is of kin to either party, within the *ninth* degree,^g that he has been arbitrator, or declared his opinion on either side; that he has an interest in the cause;^h that there is an action depending between him and the party; that he has taken money for his verdict, or even eat and drank at *either party's expense; that he has formerly been a juror in [*905] the same cause; that he is the party's master, servant, tenant,ⁱ counsellor, steward, or attorney, or of the same society or corporation with him. All these are principal causes of challenge: Besides which there are challenges to the *favour*, where the party objects only on account of some probable grounds of suspicion, as acquaintance, and the like; the validity of which must be left to the determination of *triers*, who, in case the first man called be challenged, are two indifferent persons named by the court; and if they try one man and find him indifferent, he shall be sworn; and then he and the two triers shall try the next; and when another is found indifferent and sworn, the two triers shall be superseded, and the two first sworn on the jury shall try the rest.^k Fourthly, a juror may be challenged *propter delictum*, as for a conviction of treason, felony, perjury, or conspiracy; or if, for some infamous offence, he has received judgment of the pillory, tumbrel, or the like, or to be branded, whipped, or stigmatized; or if he be outlawed or excommunicated, or hath been attainted of false verdict, *præmunire*, or forgery. A juror may himself be examined on his *voire dire*, with regard to such causes of challenge as are not to his dishonour or discredit; but not with regard to any crime, or any thing which tends to his disgrace or disadvantage.^l

In a late case,^m the following points, respecting challenges of jurors, were determined, after special argument, by the court of King's Bench: first, that no challenge can be taken, either to the array or to the polls, until a full jury have appeared; and therefore, where the challenges are previously taken, they are irregular: secondly, that when a challenge is made, the adverse party may either demur, which brings into consideration the legal validity of the matter of challenge; or counterplead, by setting up some new matter consistent with the matter of challenge, to vacate and annul it as a ground of challenge; or he may deny what is alleged for matter of challenge, and it is then, and then only, that triers are to be appointed: and therefore, where the grounds of challenge were not put on the record, the defendants were holden not to be in a condi-

^f Gilb. C. P. 95.

^g Finch L. 401.

^h 3 Bur. 1856.

ⁱ Gilb. C. P. 95.

^j Co. Lit. 158.

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^k For more of Challenges, see Co. Lit. 156, &c. Gilb. C. P. Chap. VIII. Bac. Abr. tit. *Juries*, (E). 3 Blac. Com. 358, &c.

^l = *Rex v. Edmonds and others*, 4 Barn. & Ald. 471.

tion to ask the opinion of the court, as a matter of right, upon their sufficiency: thirdly, that there can be no challenge to the array, on the ground of unindifferency in the master of the Crown office, he being the officer of the court expressly appointed to nominate the jury: [*906] The only remedy in such a case, is *to apply to the court by motion, to appoint some other officer to nominate the jury: fourthly, that it is no objection to the conduct of the master of the Crown office, that, in striking the jury, he selected the names of the jurors, and did not take them by chance from the freeholder's book; or that he took those only, whose names had the addition of *Esquire*, or of some higher degree; or included some persons who were in the commission of the peace: fifthly, that it is no ground of challenge to the array, for unindifferency on the part of the sheriff, that his officer had neglected to summon one of the twenty-four special jurymen, returned on the panel: sixthly, that it is not competent to ask jurymen, whether *special* jurymen or *tales-men*, if they have not, previously to the trial, expressed opinions hostile to the defendants and their cause, in order to found a challenge to the polls on that ground; but that such expressions must be proved by extrinsic evidence: and lastly, that the disallowing of a challenge is not a ground for a new trial, but for what is strictly and technically called a *venire de novo*.

By the *balloting* act, we may remember, the names and additions of the jurors are to be written on pieces of parchment or paper, of equal size, and delivered to the marshal, by the under-sheriff or his agent; and are to be rolled up, by the direction and care of the marshal, all as near as may be in the same manner, and put together in a box or glass to be provided for the purpose.^a And, by the same act,^o "when any cause shall be brought on to be tried, some indifferent person, by direction of the court, may and shall, in open court, draw out *twelve* of the said parchments or papers, one after another; and if any of the persons whose names shall be so drawn, shall not appear, or be challenged and set aside, then such further number, until twelve persons be drawn who shall appear, and after all causes of challenge, shall be allowed as fair and indifferent; and the said twelve persons so first drawn and appearing, and approved as indifferent, their names being marked in the panel, and they being sworn, shall be the jury to try the said cause; and the names of the persons so drawn and sworn, shall be kept apart by themselves, in some other box or glass to be kept for that purpose, till such jury shall have given in their verdict, and the same is recorded, or until such jury shall, by consent of the parties, or leave of the court, be discharged; and then the same names shall be rolled up again, and returned to the former box or glass, there to be kept, [*907] with the other names remaining at that time *undrawn; and so *toties quoties*, as long as any cause remains then to be tried."

When a *view* is allowed in any cause, it is provided by the same statute,^p that the jurors who took the view, or such of them as shall appear, shall be first sworn upon the jury to try the cause, before

^a *Ante*, 842.^o 3 Geo. II. c. 25. § 11.^p § 14.

any drawing as aforesaid; and so many only shall be drawn, to be added to the viewers who appear, as shall, after all defaulters and challenges allowed, make up the number of *twelve*, to be sworn for the trial of the cause.

At common law, if a sufficient number of jurymen did not appear at the trial, or so many of them were challenged and set aside, as that the remainder would not make up a full jury, there issued a writ to the sheriff, of *undecim*, *decem*, or *octo tales*, according to the number that was deficient, in order to complete the jury:¹ And this is still necessary, on trials at bar.² But now, by the statute 35 *Hen. VIII. c. 6. § 6, 7, 8.* (extended to *qui tam* actions, by the 4 & 5 *Ph. & M. c. 7.*) “the justices of assize or *nisi prius*, upon request made by the plaintiff or defendant, are authorized to command the sheriff, or other minister to whom the making of the return shall appertain, to name and appoint, as often as need shall require, so many of such other able persons of the said county, then present at the said assizes or *nisi prius*, as shall make up a full jury; which persons shall be added to the former panel, and their names annexed to the same; and that the parties shall have their challenges to the jurors so named, added and annexed to the said former panel, as if they had been impanelled upon the *venire facias*; and that the said justices shall and may proceed to the trial of every such issue, with those persons that were before impanelled and returned, and with those newly added and annexed to the said former panel, in such wise as they might or ought to have done, if all the said jurors had been returned upon the writ of *venire facias*; and that every such trial shall be as good and effectual in the law, to all intents and purposes, as if such trial had been had by twelve of the jurors impanelled and returned upon the writ of *venire facias*.” The qualification of a *tales-man*, in point of estate, is only *five pounds per annum*.³ And, by the 7 & 8 *W. III. c. 32. § 3.* the sheriff is directed to return such persons to serve upon the *tales*, as shall be returned upon some other panel, and then attending the court. Hence it is usual to draw their names out of the box; though where it is desired by the gentlemen of the panel who appear, and consented to by the parties, the sheriff may return such other [*908] gentlemen as can be procured to attend.⁴ And, it is not necessary, upon awarding a *tales*, that the talesmen should be selected out of persons accidentally present; but they may be selected out of persons, whose presence the sheriff or coroner has taken previous means to obtain.⁵ In the King’s Bench, the master may allow the sum of one guinea each to *tales-men*, on the trial of a cause by a special jury in *London* or *Middlesex*.⁶ The plaintiff may avoid a nonsuit, by refusing to pray a *tales*.⁷ And, after a juror has been challenged on the principal panel, he ought not to be sworn as a *tales-man*.⁸

¹ Gilb. C. P. 73.

² 5 Durnf. & East, 457, 8. 462.

³ Stat. 4 & 5 W. & M. c. 24. § 18.

⁴ Bul. N. Pri. 305.

⁵ 2 Barn. & Cres. 104. 3 Dowl. & Ryl. (1).

311. S. C.

⁶ 1 Chit. Rep. 544.

⁷ 1 Str. 707.

⁸ Id. 640. 2 Ld. Rayn. 1410. S. C. And see further, as to *tales-men*, 2 Saund. 349.

When the jury are sworn, the *junior* counsel for the plaintiff opens the pleadings; after which, if the proof of the issue rest on the plaintiff, as where the general issue is pleaded, the *senior* or leading counsel states his case to the jury; and after calling and examining witnesses in support of it, the counsel for the defendant are heard; and if they call any witnesses, the plaintiff's counsel have the general reply.[†] But when there is a rule to pay money into court, the mere production of the rule by the defendant is not, we have seen,^a considered as evidence on his part, so as to give the right of reply to the plaintiff. And where the general issue is not pleaded, but issue is joined on a collateral fact, as the execution of a release in *assumpsit* or *debt*, or a right of way in *trespass*, the proof of which rests on the defendant, his counsel begin, after the pleadings are opened, and have the general reply. The same order is observed in *trespass quare clausum fregit*, if the defendant plead, as to the coming with force and arms, and whatever else is against the peace, not guilty, and as to the residue of the trespasses a justification, which is denied by the replication;^b and in *ejectment*, by the heir at law against a devisee, if the defendant will admit the lessor of the plaintiff to be heir.^c So, if the lessor of the plaintiff prove his pedigree, and there stop, and the defendant set up a new case in his defence, which is answered by evidence on the part of the lessor of the plaintiff, the defendant is entitled to the general reply:^d which is also the case, where the lessor of the plaintiff claims under a will, and the defendant under a codicil thereto, the validity of which is the question between them, and the defendant admits the title of the lessor of the plaintiff under the will.^e In *assumpsit* for goods sold and delivered, on a plea of coverture, if the plaintiff elect to begin, he must go into his whole case; but if the defendant admit the debt, *he* is entitled to begin.^f And in an action of *trespass*, where the general issue is pleaded, and also special pleas, alleging a clandestine removal of goods to avoid a distress, the plaintiff ought to go into the whole of his case in the first instance.^{g†}

^a *Ante*, 679.

^b 3 Campb. 366. 2 Stark. *Ni. Pri.* 518.

^c 2 Stark. *Ni. Pri.* 519.

^d 4 Durnf. & East, 497. 3 Stark. *Ni. Pri.* 8.

^e 3 Campb. 368. 2 Stark. *Ni. Pri.* 520.

^f 3 Stark. *Ni. Pri.* 178.

^g 2 Stark. *Ni. Pri.* 31. and see 3 Esp.

Ni. Pri. 105. 1 Stark. *Ni. Pri.* 72. 2 Stark. *Ni. Pri.* 519, 20. 555.

† If the first witness called unexpectedly gives evidence against the party calling him, the former is not thereby concluded, but is at liberty to proceed and call other witnesses, to shew the truth and to have the whole of the testimony in the cause fully presented to the jury. But it is equally a rule of law, that if a party call a witness to prove a fact which he supposes him capable of proving, he cannot, when he finds himself deceived, and that the witness disproves the fact, give general evidence to shew that he is unworthy of credit on his oath; he can only prove, by other evidence, that the witness was mistaken respecting the fact which he was called to prove. 5 *Dowl. & Ry.* 634, 633.

‡ And in general, after the plaintiff's case has been closed, the court will not allow him to remedy a defect in his evidence, unless it has occurred from inadvertency on the part of his counsel. 1 Stark. *N. P. R.* 117. He will be allowed, likewise, to adduce fresh evidence in order to obviate objections which are beside the justice of the case, but not to get rid of any difficulties on the merits. 2 *Carring. & Payne*, *N. P. R.* 259. If he fails in proving the case stated to the jury, he cannot afterwards go into a new case which has not been stated. 1 Stark. *N. P. R.* 72.

*When several defendants appear by separate attorneys, [*909] and have separate counsel, if they are in the same interest, only one counsel can be heard to address the jury, and the witnesses are to be examined by one counsel on the part of all the defendants, in the same manner as if the defence were joint.^h And when there are several counsel on the same side, and a *junior* has begun to examine a witness, the leader may interpose, take the witness into his own hands, and finish the examination.ⁱ But after one counsel has brought his examination to a close, a question cannot regularly be put to the witness, by another counsel on the same side.ⁱ And, if a *junior* counsel at *nisi prius* take a well founded objection, which his leader gives up, the court of Common Pleas will not entertain it, in discussing a rule for a new trial or nonsuit on another ground.^k So, if the leading counsel at *nisi prius* take one line of case, contrary to the opinion of the *junior* counsel, that court will not permit the latter to obtain a new trial, upon the ground that he was prepared with evidence to support another line of case, which his leader repudiated.^l And if the plaintiff's counsel acquiesce in the judge's ruling at the trial, whereby the defendant takes a verdict, without going into his case, the plaintiff will not afterwards be permitted to move for a new trial, on the ground of a misdirection.^m

In a *criminal case*, a prosecutor conducting his cause in person, and who is to be examined as a witness in support of the indictment, has no right to address the jury, in the same manner as counsel.ⁿ And where a defendant, in addressing the jury, is guilty of a contempt, a judge at *nisi prius* has the power of fining him.^o The defendant, on the trial of a misdemeanour, cannot have the assistance of counsel to examine the witnesses, and reserve to himself the right of addressing the jury.^p But if he conduct his defence himself, and any point of law arises, which he professes himself unable to argue, the court will hear it argued by his counsel.^q And where, upon an information for a misdemeanour, the defendant calls no witnesses, the counsel for the prosecution, except in the case of the Attorney general, is not entitled to a reply.^r If the counsel however for the defendant, on an indictment for a misdemeanour, open new facts in his address to the jury, and afterwards decline calling witnesses to prove the facts so opened, the counsel [*910] for the prosecution is notwithstanding entitled to a general reply.^s

It frequently happens, that persons are made defendants with others, for the mere purpose of excluding their testimony: In this case, if no evidence whatever be given against the person so improperly made defendant, he may be acquitted immediately after the plaintiff has closed his case, and may then be examined as a witness on behalf of the other defendants; but if there be any, even the slightest, evidence to charge one defendant, he cannot be acquitted

^h 4 Campb. 174. but see 3 Stark. N. S. C. and see *id.* 602. *Pri.* 162.

ⁱ 2 Campb. 280.

^j 3 Taunt. 531.

^k 4 Taunt. 779.

^l 6 Taunt. 336.

^m 2 Barn. & Ald. 606. 1 Chit. Rep. 352.

ⁿ 2 Barn. & Ald. 329.

^o 3 Campb. 98.

^p *Id. ibid.*

^q Peake's Cas. N. Pri. 236.

^r Dowl. & Ryl. N. Pri. 59.

immediately, so as to enable him to give evidence for the others, but the case must go altogether to the jury:¹ And the acquittal of one of several defendants is not a matter of right, which the defendants counsel can claim; it being discretionary with the judge at *nisi prius*, whether he will direct the acquittal of the defendants against whom there is no evidence, at the close of the plaintiff's case, for the purpose of making them witnesses for the co-defendants.² So, in an action against several defendants for goods sold, some of whom pleaded bankruptcy, and others the general issue, the court of Common Pleas held, that after the plaintiff had closed his case, and the bankrupt defendants had proved their bankruptcy, one of them could not be admitted as a witness, to shew a dissolution of the partnership prior to the delivery of the goods.³

In this manner the trial proceeds, unless the parties agree to *withdraw* a juror;⁴ which is frequently done, at the recommendation of the judge, where it is doubtful whether the action will lie; and in such case the consequence is, that each party pays his own costs.

In the progress of the trial, either party, if there be occasion, may tender a *bill* of exceptions, or *demur* to the evidence. To understand the nature of these proceedings, it should be observed, that in the first stage of that process under which facts are ascertained, the judge decides whether the evidence offered conduces to the proof of the fact which is to be ascertained; and there is an appeal from his judgment, by a bill of exceptions. The admissibility [*911] of the evidence *being established, the question *how far* it conduces to the proof of the fact which is to be ascertained, is not for the judge to decide, but for the jury exclusively; with which the judges interfere in no case, but where they have in some sort substituted themselves in the place of the jury in *attaint*, upon motions for new trials. When the jury have ascertained the fact, if a question arise, whether the fact thus ascertained maintains the issue joined between the parties, or in other words, whether the law arising upon the fact (the question of law involved in the issue depending upon the true state of the fact,) is in favour of one or other of the parties, that question is for the judge to decide. Ordinarily, he declares to the jury, what the law is upon the fact which they find, and then they compound their verdict of the law and fact thus ascertained. But if the party wish to withdraw from the jury the application of the law to the fact, and all consideration of what the law is upon the fact, he then demurs in law upon the evidence; and the precise operation of that demurrer is, to take

¹ Peake's Evid. 2 Ed. 152, 3. Phil. Evid. 4 Ed. 75, 6.

² Holt *Ni. Pri.* 275. *per Gibbs*, Ch. J. and see 1 Stark. *Ni. Pri.* 98, 9. where Lord *Ellenborough* held, that a defendant, against whom no evidence had been given before the plaintiff closed his case, ought

not to be acquitted before the whole case was ready for the jury.

³ 7 Taunt. 599. 1 Moore, 332. S. C.

⁴ 1 Campb. 268. 2 Campb. 442. 1 Stark. *Ni. Pri.* 63, 98. For the form of the *postea*, where a juror is withdrawn, see Append. Chap. XXXVII. § 28.

from the jury, and refer to the court, the application of the law to the fact.²

A bill of *exceptions* then is founded upon some objection in point of law, to the opinion and direction of the court, upon a trial at bar, or of the judge at *nisi prius*, either as to the competency of witnesses,^a the admissibility of evidence,^b or the legal effect of it;^c or for over-ruling a challenge, or refusing a demurrer to evidence,^d &c. In these cases it is enacted, by the statute *Westm. 2. (13 Edw. I.) c. 31.* that "if the party write the exception, and pray that the justices may put their seals to it for a testimony, the justices shall put their seals; and if one will not, another shall: And if the king, on complaint made of the justices, cause the record to come before him, and the exception be not found in the roll, and the party shew the exception written, with the seal of the justice affixed, the justice shall be commanded that he appear at a certain day, to confess or deny his seal: and if the justice cannot deny his seal, judgment shall be given according to the exception, as it may be allowed or disallowed." This statute extends to *inferior* courts;^e and to trials at bar, as well as those at *nisi prius*: but it has been doubted, whether the statute extends to criminal cases.^f If a judge allow the matter *to be evidence, but not conclusive, and so refer it to the jury, [*912] no bill of exceptions will lie; as if a man produce the probate of a will, to prove the devise of a term for years, and the judge leave it to the jury; because though the evidence be conclusive, yet the jury may hazard an *attaint* if they please, and the proper way had been to have demurred to the evidence.^g

The bill of exceptions must be tendered at the trial: for if the party then acquiesce, he waives it, and shall not resort back to his exception, after a verdict against him; when perhaps, if he had stood upon his exception, the other party had more evidence, and need not have put the cause on that point. The statute indeed appoints no time; but the nature and reason of the thing require that the exception should be reduced to writing, when taken and disallowed, like a special verdict, or demurrer to evidence; not that it need be drawn up in form, but the substance must be reduced to writing, while the thing is transacting, because it is to become a record.^h When a bill of exceptions has been tendered, the court will not grant a motion for a new trial, unless the bill of exceptions be abandoned.ⁱ And if a party who, at the trial of a cause, has tendered a bill of exceptions, bring a writ of error, before he has procured the judge's signature to such bill, he thereby waives the bill of exceptions, and will not be permitted by the court of error, afterwards to tack or append the bill of exceptions to the writ of error.^k

^a 2 H. Blac. 205, 6.

^b 3 Durnf. & East, 27.

^c 1 Salk. 284.

^d T. Raym. 404. T. Jon. 146. S. C. 1 Blac. Rep. 555. 3 Bur. 1693. S. C. Cowp. 161. 2 Blac. Rep. 929. S. C.

^e Cro. Car. 341. 2 H. Blac. 208, 9. and see Show. P. C. 120.

^f 2 Inst. 427.

^g See the cases referred to in 1 Bac. Abr. 325. Willes, 535. Bul. N. Pri. 316. and stat. 55 Geo. III. c. 42. § 7. as to a bill of exceptions in the jury court in Scotland.

^h T. Raym. 404. 5. T. Jon. 146. S. C.

ⁱ 1 Salk. 288, 9.

^j 2 Chit. Rep. 272.

^k 1 Bing. 17.

The bill of exceptions is either tacked to the record, or not: If it be not tacked to the record, it is necessary to set out the whole of the proceedings, previous to the trial;¹ but otherwise, it begins with the proceedings after issue joined:^m And in either case, it goes on to state, according to the circumstances, that a witness was producedⁿ to prove certain facts; the particular evidence offered,^o or given to the jury, in support of the whole or a part of the case; or that a challenge was made, or demurrer to evidence tendered; the allegations of counsel, respecting the competency of the witness, the admissibility of the evidence, or the legal effect of it, &c.; the opinion and direction of the court or judge thereon; the verdict of the jury; and the exception of the counsel, to the opinion given.^p [*913] And where the bill of "exceptions respects the legal effect of evidence; the conclusion is as follows: "And inasmuch as the said several matters, so produced and given in evidence for the party objecting, and by his counsel objected and insisted on, do not appear by the record of the verdict aforesaid, the said counsel did then and there propose their aforesaid exception to the opinion of the judge, and requested him to put his seal to this bill of exceptions, containing the said several matters so produced and given in evidence for the party objecting as aforesaid, according to the form of the statute in such case made and provided; and thereupon the aforesaid judge, at the request of the said counsel for the party objecting, did put his seal to this bill of exceptions, pursuant to the aforesaid statute in such case made and provided, on the — day of — in the — year of the reign, &c."^q

On tendering the bill, if the exceptions therein are truly stated, the judges ought to set their seals, in testimony that such exceptions were taken at the trial; but if the bill contain matters false, or untruly stated, or matters wherein the party was not over-ruled, the judges are not obliged to affix their seals; for that would be to command them to attest a falsity.^r If the judges refuse to sign the bill of exceptions, the party grieved may have a writ, grounded upon the statute commanding them to put their seals *juxta formam statuti*,^s &c. This writ contains a surmise of an exception taken and over-ruled, and commands the justices, that *if it be so*, they put their seals;^t upon which, if it be returned *quod non ita est*, an action lies for a false return, and thereupon the surmise will be tried, and if found to be so, damages will be given; and upon such recovery, there issues a peremptory writ.^u

When the bill of exceptions is sealed, the truth of the facts con-

¹ Append. Chap. XXXVII. § 45.

^m *Id.* § 46. Bul. Ni. Pri. 317.

ⁿ 3 Durnf. & East, 27.

^o 1 Lutw. 905. 1 Salk. 284.

^p For precedents of bills of exceptions, as to the legal effect of the whole of the evidence, see Brownl. 129. *Money* and others v. *Leach*, Bul. Ni. Pri. 317. and *Fabrigas v. Mostyn*, XI. Stat. Tri. 187, 8. Append. Chap. XXXVII. § 45. And for precedents of a bill of excep-

tions, as to the legal effect of evidence in support of a particular fact, see Brownl. 131.; and as to a witness being bound to answer a question tending to disgrace him, see Append. Chap. XXXVII. § 46.

^q Bul. Ni. Pri. 317.

^r Show. P. C. 120.

^s 2 Inst. 427. Bul. Ni. Pri. 316. but see 1 Madd. Chan. 15, 16.

^t *Reg. Brev.* 182.

^u 2 Inst. 427.

tained in it can never afterwards be disputed.* And judgment being entered, a writ of error is brought, to remove the proceedings into the court above: for a bill of exceptions is only to be made use of upon a writ of error;⁷ and therefore, where a writ of error will not lie, there can be no bill of exceptions.* And a bill of *exceptions being no part of the record in the court below, [*914] is not to be included in the taxation of costs there.* Upon the return of the writ of error, the judge is called upon by writ, either to confess or deny his seal;^b and if he confess it, the proceedings being entered of record, the party assigns error:^c If the judge deny his seal, the plaintiff in the writ of error may take issue thereupon, and prove it by witnesses.^d On a writ of error from the court of King's Bench in *Ireland*, the proper mode is to send a writ from this country to the chief justice of that court, to take the acknowledgment of the seal of the judge at *nisi prius*.^e

The judgment on the writ of error, as in other cases, is either that the former judgment be affirmed or reversed. If it be reversed, a *venire de novo* issues; which must be made returnable in the King's Bench, although the judgment was given in the Common Pleas.^f

A *demurrer* to evidence is a proceeding, by which the judges of the court in which the action is depending, are called upon to declare what the law is, upon the facts shewn in evidence, analogous to the demurrer upon facts alleged in pleading.^g The reason for demurring to evidence is, that the jury, if they please, may refuse to find a special verdict, and then the facts never appear on the record.^h And the question upon a demurrer being, whether the evidence offered be sufficient to maintain the issue, the party, on such demurrer, cannot take advantage of any objection to the pleadings.ⁱ A demurrer to evidence is not allowed in the king's case; and therefore if a doubt arise, upon the effect of the evidence, the judge must direct the jury to find the matter specially.^k

If a matter of *record*, or other matter in *writing*, be offered in evidence, to maintain an issue joined between the parties, all the books agree, that the adverse party may insist upon the jury being discharged from giving a verdict, by demurring to the evidence, and obliging the party offering the same to join in demurrer, or waive the evidence:^l and the reason given for it is, that there cannot be any *variance of matter in writing.^m The books also agree, that [*915]

* Show. P. C. 120.

⁷ But see 2 Inst. 427. by which it seems, that a bill of exceptions may be also used on a writ of false judgment from the county or hundred courts, or from the court baron.

^a 1 Salk. 284. *Rex v. Inhabitants of Preston*, Bul. N. Pri. 316. 1 Blac. Rep. 679. Cowp. 501. but see 2 Lev. 236.

^b 1 Bos. & Pul. 32.

^c East. Ent. 293. b. 3 Bur. 1693. 1 Blac. Rep. 556. S. C.

^d 1 Lutw. 905, 6. And for assignments of and other proceedings in error, on bills

of exceptions, see Append. Chap. XLIV. § 60, 61, 70, 92, 3.

^e 2 Inst. 428.

^f *Barry v. Nugent*, in error, M. 23 Geo.

III. K. B. and see Cowp. 501.

^g 3 Durnf. & East, 36.

^h 2 H. Blac. 205. and see 3 Salk. 122. 4 Bac. Abr. 136. 3 Blac. Com. 372. Append. Chap. XXXVII. § 41, &c.

ⁱ *Per Buller*, J. Doug. 134.

^j Doug. 218.

^k Co. Lit. 72. 5 Co. 104.

^l 2 H. Blac. 206.

^m Cro. Eliz. 752, 5 Co. 104. S. C.

if *parol* evidence be offered, and the adverse party demur, he who offers the evidence *may* join in demurrer, if he will. But the language of the old books is very indistinct upon the question, whether the party offering *parol* evidence shall be *obliged* to join in demurrer. In a late case,^a which came before the House of Lords, it was observed, in delivering the opinion of the judges, that *parol* evidence is sometimes certain, and no more admitting of any variance than a matter in writing; but it is also often loose and indeterminate, often circumstantial. The reason for obliging the party offering evidence in writing to join in demurrer, applies to the first sort of *parol* evidence; but it does not apply to *parol* evidence that is loose and indeterminate, which may be urged with more or less effect to a jury; and least of all, will it apply to evidence of circumstances, which evidence is meant to operate beyond the proof of the existence of those circumstances, and to conduce to the proof of the existence of other facts. In such cases however, if the party who demurs will admit the evidence of the fact, which evidence is loose and indeterminate, or, in the case of circumstantial evidence, if he will admit the existence of the fact which the circumstances offered in evidence conduce to prove, there will then be no more variance in this *parol* evidence, than in a matter in writing; and in such case, the party shall be allowed to demur, and his adversary must join in demurrer. But on a demurrer to *circumstantial* evidence, unless the party demurring will distinctly admit upon the record, every fact and every conclusion which the evidence offered conduces to prove, it is not competent for him to insist upon the jury being discharged from giving a verdict, by demurring to the evidence, and obliging the party offering it to join in demurrer;^b though, if the party offering the evidence consent to waive the objection, and join in demurrer, every fact is to be considered by the court as admitted, which the jury could infer in his favour, from the evidence demurred to:^c And the court will, if they can, give judgment upon such evidence;^d but otherwise a *venire de novo* must be awarded.^e

The whole operation of entering the matter upon record, and conducting a demurrer to evidence, is and ought to be under the direction and control of the court, upon a trial at bar, or of the [*916] judge at **nisi prius*,^f subject however to an appeal, by a bill of exceptions, if the demurrer be refused.^g And where a demurrer to evidence is admitted, it is usual for the court or judge to give orders to the associate, to take a note of the testimony; which is signed by the counsel on both sides, and the demurrer is affixed to the *postea*.^h Upon a demurrer to evidence, we have seen, the damages may be assessed *conditionally* by the principal jury, before they are discharged; or they may be assessed by another

^a *Gibson and Johnson v. Hunter*, 2 H. Blac. 187.

^b *Id. ibid.* and see *Aleyn*, 18. Sty. Rep. 22. 34. 8. C.

^c *Doug.* 119.

^d *Id. ibid.*

^e 2 H. Blac. 209.

^f 2 H. Blac. 208.

^g *Id. ibid.* Cro. Car. 341.

^h *Bul. N. Pri.* 313. and see *Append. Chap. XXXVII. § 41.*

jury, upon a writ of inquiry, after the demurrer is determined:^{*} And it is said to be the most usual course, when there is a demurrer to evidence, to discharge the jury without further inquiry.[†]

The evidence being gone through, and summed up by the judge,[‡] the jury, if they think proper, may *withdraw* from the bar, to deliberate on their verdict. And they are allowed to take with them, by leave of the court, letters patent, and deeds under seal, and the exemplification of witnesses in Chancery, if dead; but writings or books which are not under seal, ought not to be delivered to the jurors, without the assent of both parties,[§] nor any evidence but what was shewn to the court.^{||} If the jury take with them patents, deeds, &c. without leave of the court, or writings not under seal, books, &c. which have been given in evidence, without the assent of both parties, this, however irregular, will not avoid the verdict, though they be taken by the delivery of the party for whom the verdict was given:^b So, though one of the jury shew a writing, which was not given in evidence, to his companions.^c But if the party for whom the verdict is given, or any for him, deliver to the jury, after they are gone from the bar, a letter or other writing not given in evidence, it will avoid the verdict:^d And so, if they examine witnesses by themselves, who were examined before, though to the same evidence as was given in court.^e But they may come back into court, to hear the evidence of a thing whereof they are in doubt.^f The objection in these cases must be returned upon the *postea*, or made parcel of the record; otherwise it will not be a ground for staying judgment, or bringing a writ of error.^g

* When the jury have agreed, they return to the bar: but [*917] before they gave their verdict, it was formerly usual to *call* or

^{*} *Ante*, 623. Plowd. 410. 1 Ld. Raym. 60. Doug. 222.

[†] Cro. Car. 143. *Ante*, 623. and see Append. Chap. XXXVII. § 43.

[‡] Cro. Eliz. 411.

[§] 2 Rol. Abr. 686.

^b Cro. Eliz. 411. and see 2 Salk. 645.

^c Cro. Eliz. 616.

^d Co. Lit. 227. b.

^e Cro. Eliz. 411, 12.

^f 2 Rol. Abr. 676.

^g Cro. Eliz. 616. and see Bul. Nt. Pri. 308.

† It is, doubtless, within the province of a court, in the exercise of its discretion, to sum up the facts in the case to the jury, and submit them, with the inferences of law deducible therefrom, to the free judgment of the jury. But, care must be taken, in all such cases, to separate the law from the facts, and to leave the latter in unequivocal terms to the jury, as their true and peculiar province. 1 *Peters' Rep. S. C. U. S.* 182. Little stress ought to be laid upon general expressions falling from judges, in the course of trials. Where the facts are not disputed, the judge often suggests, in a strong and pointed manner, his opinion as to their materiality and importance, and his leading opinion of the conclusion to which the facts ought to conduct the jury. This ought not to be deemed an intentional withdrawal of the facts, or the inferences deducible therefrom, from the cognizance of the jury, but rather as an expression of opinion addressed to the discretion of counsel, whether it would be worth while to proceed further in the cause. And the like expression in summing up any cause to the jury, must be understood by them merely as a strong exposition of the facts, not designed to overrule their verdict, but to assist them in forming it. And there is the less objection to this course in the English practice; because, if the summing up has had an undue influence, the mistake is put right by a new trial, upon an application to the discretion of the whole court. *Id.* 190.

demand the plaintiff, in order to answer the amercement, to which by the old law he was liable, in case he failed in his suit;^b and it is now usual to call him, whenever he is unable to make out his case, either by reason of his not adducing evidence in support of it, or evidence arising in the proper county: And if it be clear that, in point of law, the action will not lie, the judge at *nisi prius* will nonsuit the plaintiff; although the objection appear on the record, and might be taken advantage of by motion in arrest of judgment, or on a writ of error.ⁱ But where the case turns on a question of fact, it ought to be submitted to the jury, unless the plaintiff's counsel expressly assent to his being nonsuited;^k a mere tacit acquiescence not being it seems sufficient.^k The cases in which it is necessary that the evidence should arise in a particular county, are either when the action is in itself local, or made so by act of parliament, as in actions upon penal statutes, &c.; or when, upon a motion to change or retain the venue, the plaintiff undertakes to give material evidence in the county where the action was brought.^l And there is this advantage attending a nonsuit; that the plaintiff, though subject to the payment of costs, may afterwards bring another action for the same cause, which he cannot do after a verdict against him.

The king cannot be nonsuited, because he is supposed to be always in court:^m and, in a joint action against several defendants, the plaintiff cannot be nonsuited as to one of them only;ⁿ and therefore if one of two defendants suffer judgment by default, and the other go to trial, the plaintiff cannot be nonsuited as to him; but such defendant must have a verdict, if the plaintiff fail to make out his case.ⁿ After a plea of tender, the plaintiff, it is said, cannot be nonsuited:^o† but it is the practice to nonsuit him, if he cannot make out his case, after paying money into court.^p So, he may be nonsuited in *scire facias*, as well as in other actions:^q And after judgment for the defendant or demurrer to certain special pleas, there may be judgment of nonsuit against the plaintiff, for not proceeding to trial upon other general pleas, on which issues were joined.^r A nonsuit, it is said, can only be at the instance of the [*918] defendant: and therefore, where the cause at *nisi prius* was called on, and jury sworn, but no counsel, attornies, parties or witnesses appeared on either side, the judge held, that the only way

^b 3 Blac. Com. 376.

ⁱ 1 Campb. 256. and see 9 Price, 294.

^k 9 Price, 291.

^l 2 Blac. Rep. 1036. but see 2 Durnf. & East, 281.

^m Com. Dig. tit. *Pleader*, X. 3.

ⁿ 3 Durnf. & East, 662. and see 1 Bur. 358. Cowp. 483. *Ante*, *470.

^o 1 Campb. 327. but see the notes thereon.

^p *Ante*, 675, 6.

^q 1 Camp. 484.

^r 10 East, 366.

† But in a very recent case in the court of King's Bench, it was held that judgment, as in case of a nonsuit, may be obtained in banc, by one of several joint defendants, if the plaintiff neglect to proceed to trial pursuant to notice. 8 Dowl. & Ry. 592.

‡ The contrary is now held, and that a verdict cannot be taken against a plaintiff who does not appear, notwithstanding a plea of tender. 3 Bingh. 290. C. B. 2 *Carring. & Payne, N. P. Rep.* 85.

was to discharge the jury; for nobody has a right to demand the plaintiff but the defendant, and the defendant not demanding him, the judge could not order him to be called.* But the plaintiff it seems may be nonsuited in an undefended cause, if he do not make out a proper case, or for a variance,¹ &c. And where the cause was undefended at *nisi prius*, and the judge directed a nonsuit, with liberty for the plaintiff to move to enter a verdict, the court may order a verdict to be entered accordingly for the plaintiff.^u When a cause is carried down by *proviso*, and the plaintiff does not appear at the trial, he should be nonsuited;² but where a verdict in such case was taken for the defendants by mistake, instead of a nonsuit, the court, though this was irregular, would not permit the plaintiff to set it aside, unless he would consent to a nonsuit being entered.[†]

In *ejectment*, if the defendant do not appear at the trial, and confess lease, entry and ouster, according to the consent rule, the practice is to call the defendant; and on his non-appearance, or refusal to comply with the rule, to call the plaintiff, and nonsuit him: and then, at the plaintiff's instance, the cause of nonsuit is indorsed on the *postea*, which entitles the plaintiff to judgment against the casual ejector, when the *postea* is returned into court.³ If there be several defendants, and some of them refuse to appear and confess, it is the practice to proceed against those who do appear, and enter a verdict for those who do not, indorsing upon the *postea*, that such verdict is entered for them, because they do not appear and confess; and the plaintiff's lessor will then be entitled to his costs against such defendants, and to judgment against the casual ejector, for the lands in their possession.⁴ But in *ejectment*, by landlord against tenant, on the statute 1 Geo. IV. c. 87. § 2. "whenever it shall appear on the trial, that such tenant or his attorney hath been served with due notice of trial, the plaintiff shall not be nonsuited, for default of the defendant's appearance, or of confession of lease, entry, and ouster; but the production of the consent rule, and undertaking of the defendant, shall in all such cases be sufficient evidence of lease, entry and ouster; and the *judge before whom such cause shall come on to be tried [*919] shall, whether the defendant shall appear upon such trial or not, permit the plaintiff on the trial, after proof of his right to recover possession of the whole or any part of the premises mentioned in the declaration, to go into evidence of the *mesne* profits thereof, which shall or might have accrued from the day of the expiration

* 1 Str. 267. and see 2 Str. 1117.

¹ 3 Taunt. 81. Append. Chap. XXXIX. § 23, &c.

² 4 Barn. & Ald. 418.

³ 2 Saund. 336. (6.) *Ante*, 822.

⁴ 1 Barn. & Cres. 110. 2 Dowl. & Ryl. 221. S. C. and see 1 Barn. & Cres. 94. 2

Dowl. & Ryl. 198. S. C.

¹ 1 Salk. 259. Sty. Pr. Reg. 442. and see Run. Eject. 2 Ed. 281. Ad. Eject. 2 Ed. 284.

² 1 Ld. Raym. 729. Bul. Nt. Pri. 98. and see Run. Eject. 2 Ed. 283, 4. Ad. Eject. 2 Ed. 285.

† In replevin, if the defendant avow for rent in arrear, and the plaintiff replies *non tenuit*, on which issue is joined; if the plaintiff do not appear by himself or his counsel to open the pleadings, he may be nonsuited, though it is the defendant's record. 2 *Carring. & Payne*, N. P. R. 358.

by the 3 & 4 *Edw.* VI. c. 3. § 4. *treble* damages may be recovered in an assize of *novel disseisin*, upon the statutes respecting the improvement of waste,¹ &c. In a writ of *dower unde nihil habet*, the widow is entitled, by the statute of *Merton*, (20 *Hen.* III.) c. 1. to recover in damages the value of her dower, from the time of the death of her husband.² In *waste*, treble damages are recoverable by the statute of *Gloucester*, (6 *Edw.* I.) c. 5. to which costs are superadded, by the 8 & 9 *W.* III. c. 11. § 3.³ And, by statute *Westm.* 2. (13 *Edw.* I.) c. 5. § 3. damages are given in writs of *quare impedit*, and *darrein presentment*.

The damages in *personal* actions are either confessed by the defendant; ascertained by the master or prothonotaries, on a bill of exchange, &c.; found by a sheriff's jury, on a judgment by default; or assessed by the jury who try the issue, on a verdict. In some cases however, they are merely *nominal*; as in an action of *debt* for a penalty at common law.⁴ And if the plaintiff has evidently sustained some damages, but the jury, being unable to ascertain the amount, find a verdict for the defendant, the court will permit the plaintiff [*922] to *enter a verdict for nominal damages.* But where an action is brought upon a bond, for the non-performance of covenants, the jury, upon the trial or writ of inquiry, are, by virtue of the statute 8 & 9 *W.* III. c. 11. § 8. to assess not only the ordinary damages and costs of suit, but also damages for such of the breaches as the plaintiff proves; and judgment shall be entered in the common form, which shall afterwards remain as a security to the plaintiff, against future breaches: And, upon a plea of *non est factum* to a bond for the performance of certain conditions, breaches of which are assigned in the declaration, the jury who try the issue may assess the damages under the common *venire*.⁵ In an action of *debt* on bond, conditioned for replacing stock, the measure of damages, in case of failure, is the price at the day when it ought to have been replaced, or the price at the day of trial, at the option of the plaintiff.⁶ In an action on a charter-party, damages may be recovered beyond the amount of the penalty:⁷ and where the precise sum is not the essence of the agreement, the *quantum* of damages may be assessed by the jury; but where the precise sum is fixed and agreed upon between the parties, that sum is the ascertained damage, and the jury are confined to it.⁸ In an action on a bond, to indemnify B. against his obligation to C. if the money were not paid before a certain day,

¹ See also the statute of *Westm.* 1. (3 *Edw.* I.) c. 24. *Westm.* 2. (13 *Edw.* I.) c. 25. 1 *Rich.* II. c. 9. 1 *Hen.* IV. c. 8. and 4 *Hen.* IV. c. 8. by which double or treble damages are given upon *disseisins* in particular cases.

² For the construction of this statute, and in what cases the widow is entitled to damages thereon, see *Co. Lit.* 32, 3.

³ But in an action of *waste*, on the statute of *Gloucester*, against tenant for years, for converting three closes of meadow into garden ground, if the jury give only one farthing damages for each

close, the court will give the defendant leave to enter up judgment for himself. 2 *Bos. & Pul.* 86.

⁴ 6 *Durnf. & East*, 303. but see 2 *Durnf. & East*, 388. 7 *Durnf. & East*, 446.

⁵ 1 *Taunt.* 121.

⁶ 2 *Stark. N. Pri.* 381.

⁷ 2 *Taunt.* 257.

⁸ 1 *Blac. Rep.* 395. and see 3 *Bur.* 1345. 13 *East*, 343.

⁹ 4 *Bur.* 2225. and see 2 *Bos. & Pul.* 346. 1 *Campb.* 78. 2 *Durnf. & East*, 32. *Holt N. Pri.* 43.

B. is entitled to recover the amount of the penalty of the bond in damages.^c In an action on a bill of exchange, or promissory note, interest is no part of the debt, but merely damages for the detention of it.^d And in *covenant* on a policy of insurance, upon the life of A., payable six months after due proof of his death, the assured is not entitled to recover interest upon the principal sum insured, from the expiration of six months after due proof of the death of A.^e But in an action of *debt*, to recover a sum awarded to the plaintiff by a jury, under the 43 Geo. III. c. CXL. and 48 Geo. III. c. XI. as a compensation to be made by the *Bristol Dock Company*, for an injury done to the plaintiff's property, by means of the works authorized by those acts, the jury may give interest, by way of damages, for the detention of the sum awarded.^f In *trover* for a bill of exchange, the damages are to be calculated according to the amount of the principal and interest due upon the bill, at the time of the conversion.^g In an action on the *case*, for enticing away the plaintiff's servants, the measure of damages is not to be ascertained by the actual loss he sustained at the time; but for the injury done him, by causing them to leave his employment.^h And in *trespass*, *for breaking and entering the plaintiff's dwelling house, [*923] under a false and unfounded charge and assertion that the plaintiff had stolen property in her house, *per quod* she was injured in her credit, the jury may give damages for the trespass, as it is aggravated by such false charge.ⁱ The jury, in an action of *debt* for the escape of a person in execution, must give a verdict for the whole debt.^k And in an action against the sheriff, for not selling the joint property of A. and B. under an execution against the goods of A. it seems that *half* the value of the goods is the proper measure of damages.^l

By the statute 28 Geo. III. c. 37. § 24.^m "in case any action, indictment or prosecution, shall be commenced and brought to trial, against any person or persons, on account of the seizing of any goods, wares, or merchandize, seized as forfeited by virtue of any act or acts of parliament relating to his majesty's revenues of *customs* or *excise*, or of any ship, vessel or boat, or of any horse, cattle or carriage, used or employed in removing or carrying the same, whether any information shall be brought to trial to condemn the same or not, and a verdict shall be given against the defendant or defendants, if the court or judge before whom such action, indictment or prosecution, shall be tried, shall certify that there was a probable cause for such seizure, then the plaintiff, besides the thing so seized, or the value thereof, shall not be entitled to above *two pence* damages, nor to any costs of suit; nor shall the defendant in such prosecution be imprisoned, or be fined above one shilling." But a judge's certificate, that a custom-house officer had probable

^c 2 Stark. *Ni. Pri.* 167. and see Dyer, 257.

^d 1 Dowl. & Ry. 16. 18, 19.

^e 2 Barn. & Cress. 348.

^f 1 Maule & Sel. 169.

^g 3 Campb. 477.

^h 4 Moore, 12.

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ⁱ 2 Maule & Sel. 77. and see 2 Stark. *Ni. Pri.* 317. *Ante*, 448.

^k 2 Chit. Rep. 454.

^l 2 Stark. *Ni. Pri.* 218.

^m And see the statutes 23 Geo. III. c. 70. § 29. 26 Geo. III. c. 40. § 31.

cause for *seizing* goods, does not extend to injuries accompanying such seizure, so as to prevent the plaintiff from recovering damages and costs under the above statute.^a And accordingly where, in *trespass* against custom-house officers, for taking the plaintiff's goods; which had been returned in a deteriorated state before action brought, a verdict was found for plaintiff, for the difference in price between the value of the goods at the time of the seizure, and the time when they were returned; and the judge certified, that there was probable cause for the seizure; the court held, that the plaintiff was not precluded by the above statute, from taking out execution for the damages found by the jury.^o

And, to render *justices* of the peace more safe in the execution of their duty, it is enacted by the statute 43 Geo. III. c. 141. that "in [*924] all actions which shall be brought against any justice or justices of the peace, in the united kingdom of *Great Britain* and *Ireland*, for or on account of any conviction by him or them had or made, under or by virtue of any act or acts of parliament in force in the said united kingdom, or for or by reason of any act matter or thing whatsoever, done or commanded to be done by such justice or justices, for the levying of any penalty, apprehending any party, or for or about the carrying of any such conviction into effect, in case such conviction shall have been quashed, the plaintiff or plaintiffs in such action or actions, besides the value and amount of the penalty or penalties which may have been levied upon the said plaintiff or plaintiffs, in case any levy thereof shall have been made, shall not be entitled to recover any more or greater damages than the sum of *two* pence, nor any costs of suit whatsoever; unless it shall be expressly alleged in the declaration, in the action wherein the recovery shall be had, and which shall be in an action upon the *case* only, that such acts were done maliciously, and without any reasonable and probable cause: And that such plaintiff shall not be entitled to recover against such justice, any penalty which shall have been levied, nor any damages or costs whatsoever, in case such justice shall prove at the trial, that such plaintiff was guilty of the offence whereof he had been convicted, or on account of which he had been apprehended, or had otherwise suffered, and that he had undergone no greater punishment than was assigned by law to such offence." But this statute does in no instance extend to protect justices of peace, in the execution of their office, against actions for acts of trespass or imprisonment, unless done on account of some *conviction* made by them of the plaintiffs in such actions, by virtue of any statute, &c.^p And it seems, that the statute extends to those cases only, where the conviction has been quashed.^q It also seems, that if a conviction be good upon the face of it, the production and proof of it at the trial, will justify the convicting magistrates, under the general issue in an action of *trespass*, as well in respect of such facts stated therein as are necessary to give them jurisdiction, as upon the merits of the conviction.^r In an action against a magistrate for a

^a 1 H. Blac. 28.

^o 5 Barn. & Ald. 762. 1 Dowl. & RyL. 417. 8. C.

^p 12 East, 67.

^q *Id.* 78, 9. 16 East, 13. 21.

^r 16 East, 13. 21. and see 3 Moore, 294.

malicious conviction, it is not sufficient for the plaintiff to shew, that he was innocent of the offence of which he was convicted, but he must also prove, from what passed before the magistrate, that there was a want of probable cause.*

*In actions upon the *case*, *trespass*, *replevin*, &c. the [*925] damages at common law are *single*, and proportioned to the injury complained of; but *double or treble* damages are sometimes given by statute, in cases where *single* damages were before recoverable, as upon the 2 *Hen.* IV. c. 11. for wrongfully suing in the admiralty court,¹ upon the 8 *Hen.* VI. c. 9. for a forcible entry,² upon the 29 *Eliz.* c. 4. for extortion,³ and upon the 2 & 3 *W. & M.* sess. 1. c. 5. for rescuing a distress for rent.⁴ In these cases, the single amount of the damages is found by the jury; and the court, on motion, will order them to be doubled or trebled.^{5†} But in an action of *debt*, on the statute 2 & 3 *Edw.* VI. c. 13. for not setting out tithes, the *treble* value of them must be found by the jury, on the general issue of *nil debet*,⁶ or, after judgment by default, on a writ of inquiry.⁷

On a declaration consisting of several counts, the jury may either assess *entire* damages, on the whole or part of the declaration, or they may assess *several* damages on the different counts.⁸ If entire damages be assessed, and any one or more of the counts be bad or inconsistent, judgment may be arrested;⁹ because it must be intended, that some part of the damages was assessed upon those counts. In order to cure this defect, if there was evidence given at the trial upon such of the counts only as are good and consistent, a general verdict may be altered, from the notes of the judge, and entered only on those counts;¹⁰ but if there was any evidence which applied to the other bad or inconsistent counts, (as for instance, in an action for *words*, where some actionable words are laid, and some not actionable, in different counts,¹¹ and evidence given of both sets of words, and a general verdict,) there the *postea* cannot be amended; because it would be impossible for the judge to say on which of the counts the jury had found the damages, or how they had apportioned them;‡ In such case therefore, the only remedy is by awarding a *venire de novo*.¹² If the jury find a verdict for the plaintiff with

* 1 Marsh. 220.

¹ 10 Co. 116. Dyer, 159. b. Carth. 297.

² Bro. Dam. pl. 70. 10 Co. 115. b. Co. Lit. 257. b. 2 Inst. 289. Cro. Eliz. 582. but see 2 Moore, 238.

³ 2 Durnf. & East, 148. and see 2 Barn. & Ald. 393. 1 Chit. Rep. 137. S. C. Append. Chap. XXIII. § 86.

⁴ Carth. 321. 1 Salk. 205. 1 Ld. Raym. 19. 342. Skin. 555. Holt Rep. 172. S. C.

⁵ 2 Durnf. & East, 159. and see 1 Chit. Rep. 141. (a.)

⁶ 2 Chit. Rep. 351.

⁷ 1 Bing. 182. *Ante*, 616.

⁸ 1 Rol. Abr. 570. pl. 1.

⁹ Bay. Dam. Ch. 25. but see the distinction taken in *Willes*, 443. 2 Saund. 171. b. d.

¹⁰ 1 Bos. & Pul. 329. 2 Saund. 171. b. .

¹¹ *Willes*, 443. 2 Saund. 171. d.

¹² Doug. 376. 722. 1 Durnf. & East, 542.

¹³ 2 Durnf. & East, 694. 2 Saund. 171. b. d. and see 1 Barn. & Ald. 161.

† That is, (as the meaning of the word *treble* was disputed in a recent case and an attempt was made to estimate *damages* by the same rule which is acted upon in the taxation of *treble costs*), three times the *full* amount of the damages found by the jury will be allowed. 6 *Doubt & Ryl.* 1. 4 *Barn. & Cres.* 154. S. C.

‡ But see the observations of Best, C. J. in the case of *Richardson v. Mellish*. 3 *Bing.* 334. C. B.

one penalty generally, in a penal action, and the plaintiff apply it to [*926] one *count, he cannot afterwards apply it to another, though the former be bad in law, and though the evidence would have warranted the verdict on any other count.^a

If there be judgment by default as to part, and an issue upon other part, or, in an action against several defendants, if some of them let judgment go by default, and others plead to issue, there ought to be a special *venire*, as well to try the issue as to inquire of the damages, *tam ad triandum, quam ad inquirendum*: and the jury who try the issue shall assess the damages for the whole, or against all the defendants.ⁱ But if a declaration in *trespass* contain two counts, and the defendant plead to one, and suffer judgment by default on the other, and on the trial of the first, the plaintiff prove one act of trespass only, which is covered by the second count, he is not entitled to a verdict on the first count.^k In the case of several defendants, when those who plead to issue are acquitted at the trial, the jury, in some instances, shall assess damages against the defendants who let judgment go by default, and in others not. In actions upon *contract*, as *covenant*,^l *assumpsit*,^m &c. the plea of one defendant, for the most part, enures to the benefit of all; for the contract being entire, the plaintiff must succeed upon it against all or none: and therefore if the plaintiff fail at the trial, upon the plea of one of the defendants, he cannot have judgment or damages against the others, who let judgment go by default: But in actions of *tort*, as *trespass*, &c. where the wrong is joint and several, the distinction seems to be this, that where the plea of one of the defendants is such as shews the plaintiff could have no cause of action against any of them, there, if this plea be found against the plaintiff, it shall operate to the benefit of all the defendants, and the plaintiff cannot have judgment or damages against those who let judgment go by default;ⁿ but where the plea merely operates in discharge of the party pleading it, there it shall not operate to the benefit of the other defendants, but notwithstanding such plea be found against the plaintiff, he may have judgment and damages against the other defendants.^o

If there be a *demurrer* to part, and an issue upon other part, or, in an action against several defendants, if some of them demur, and others plead to issue, the jury who try the issue shall assess [*927] the *damages for the whole, or against all the defendants: In this case, if the issue be tried before the demurrer is argued, the damages are said to be *contingent*,^p depending upon the event of the demurrer. But when the issue, as well as the demurrer, goes to the whole cause of action, the damages shall be assessed upon the issue, and not upon the demurrer.

When there are several defendants, who sever in pleading, the

^a 3 Durnf. & East, 448. 5 Taunt. 2. but see 3 Bur. 1237. *semb. contra*.

ⁱ 11 Co. 5. 2 Bos. & Pul. 163.

^k 7 Durnf. & East, 727.

^l 1 Lev. 63. 1 Sid. 76. 1 Keb. 284. S. C.

^m Cas. Fr. C. P. 107. Prac. Reg. 102. S.

C. 3 Durnf. & East, 662. 2 H. Blac. 28. but see 1 Salk. 23. *semb. contra*.

ⁿ 2 Ld. Raym. 1372. 1 Str. 610. 8 Mod. 217. S. C.

^o 2 Str. 1108. 1222.

^p *Ante*, 779.

jury who try the first issue shall assess damages against all, with a *cesset executio*; and the other defendants, if found guilty, shall be contributory to those damages.^a In *trespass* against several defendants, who join in pleading, if the jury on the trial find them all jointly guilty, they cannot assess several damages.^b But they may find some of them guilty, and acquit others; in which case, the damages can be assessed against those only who are found guilty: Or they may find some of the defendants guilty of the whole trespass, and others of a part only;^c or some of them guilty of part, or at one time, and the rest guilty of other part, or at another time;^d in either of which cases, they may assess several damages. And where, in an action against several defendants, the jury by mistake have assessed several damages, the plaintiff we have seen,^e may cure it, by entering a *nolle prosequi* as to one of the defendants,^f and taking judgment against the others;^g or he may enter a *remittitur* as to the lesser damages;^h or even, without entering a *remittitur*, he may take judgment against all the defendants, for the greater damages.ⁱ

When the jury, upon the trial of an issue, have omitted to assess the damages, we have before seen in what cases the omission may be supplied by a writ of inquiry.^j When the jury give greater damages than the plaintiff has declared for, it may be cured by entering a *remittitur* of the surplus, before judgment;^k or the plaintiff may amend his declaration, and have a new trial.^l And, in an action for a *mayhem*, the damages may be increased by the court, on view of the party.^m

*On a *general* verdict, if false, the jury were liable to be [*928] attainted.ⁿ To relieve them from this difficulty, it was enacted by the statute of *Westm. 2.* (13 *Edw. I.*) c. 30. § 2. that "the justices of assize shall not compel the jurors to say precisely whether it be *disseisin* or not, so as they state the truth of the fact, and pray the aid of the justices; but if they will say, of their own accord, that it is *disseisin*, their verdict shall be admitted at their own peril." Upon this statute it has become the practice for the jury, when they

^a 11 Co. 5. If *A.* recover in *tort* against two defendants, and levy the whole damages on one of them, that one cannot recover a moiety against the other for his contribution; *aliter in assumpsit.* 8 Durnf. & East, 186. Holt *Ni. Pri.* 245.

^b Cro. Eliz. 860. 11 Co. 5. 1 Str. 422. 2 Str. 910. 5 Bur. 2792. 6 Durnf. & East, 199. but see 1 Str. 79. 2 Str. 1140.

^c Cro. Eliz. 860. 11 Co. 5. Sty. Rep. 5.

^d 11 Co. 6. Brownl. 233. Cro. Car. 54.

^e *Ante*, 736.

^f 11 Co. 5. Cro. Car. 239. 243. Carth. 19.

^g 11 Co. 7. a. Cro. Car. 192. 1 Wils. 30.

For the cases where a *remittitur damna* is allowed, and where not, see 1 Saund. 285. (5, 6). 286. (10.)

^h *Ante*, 621, &c.

ⁱ Yelv. 45. 2 Str. 1110. 1171. but if judgment be entered for more damages than are laid in the declaration, it is error. 2 Blac. Rep. 1300.

^j *Ante*, 753, 4.

^k 1 Ld. Raym. 176. 3 Salk. 115. S. C. 1 Wils. 5. Barnes, 153. *Hoare v. Crozier*, E. 22 Geo. III. K. B. and see 1 Rol. Abr. 572, 3.

^l Gilb. C. P. 71.

^m As to the entering of a *nolle prosequi* against one of several defendants, see 1 *Peters' Rep. S. C. U. S.* 47, 80. 83—88. where the law and practice on that subject is very fully considered and discussed in the judgment of the court, and in the opinion of a judge who dissented.

have any doubt as to the matter of law, to find a *special* verdict, stating the facts, and referring the law arising thereon to the decision of the court; by concluding conditionally, that if upon the whole matter alleged, the court shall be of opinion, that the plaintiff had cause of action, they then find for the plaintiff; if otherwise, then for the defendant.* In finding special verdicts, when the points are single and not complicated, and no special conclusion, the counsel, (if required,) are to subscribe the points in question, and agree to amend omissions or mistakes in the mesne conveyance, according to the truth, to bring the point in question to judgment:† And unnecessary finding of deeds *in hæc verba*, where the question rests not upon them, but which are only derivation of title, ought to be spared, and stated shortly, according to the substance they bear in reference to the deed, as feoffment, lease, grant, &c.‡ It is also a general rule, that in a special verdict, (as nothing is to be intended,§) the jury must find facts, and not merely the evidence of facts:¶ And if in this, or any other particular, the verdict be defective, so that the courts are not able to give judgment thereon, they will amend it, if possible, by the notes of counsel, or even by an affidavit of what was proved upon the trial;‡ or otherwise they will supply the defect, by awarding a *venire de novo*.‡ But it is said, that in a special verdict, the not finding of collateral matter shall be supplied;‡ and the law, which is favorable to verdicts,‡ will suppose that the jury doubted of nothing but what related to the matter in question before them.‡ So, on a special verdict with a general conclusion, the court will doubt of no more than the jury doubted of.‡ And if a special verdict, on a mixed question of fact and law, find facts, from which the court can draw clear conclusions, it [*929] is no objection to the verdict, that the jury have not themselves drawn such conclusions, and stated them as facts in the case.*

If there be a special verdict, the plaintiff's attorney generally gets it drawn from the minutes taken at the trial, and settled by his counsel or serjeant, who signs the draft. It is then delivered over to the opposite attorney, who gets his counsel or serjeant to peruse and sign it; and when the verdict is thus settled and signed, it is left with the clerk of *nisi prius* or associate in a town cause, or with the associate in the country, who makes copies for each party. The whole proceedings are then entered, docketed, and filed of record; after which a *concilium* is moved for, a rule drawn up thereon with the clerk of the rules in the King's Bench, or secondaries in the Common Pleas, the cause entered with the clerk of the papers or secondaries, copies of the record made and delivered to the judges, and counsel instructed and heard, in like manner as upon arguing a

* 3 Blac. Com. 377, 8. For the form of a special verdict in *ejectment* see Append. Chap. XLVI. § 20.

† R. M. 1654. § 20. K. B. R. M. 1654. § 23. C. P. but see 2 Saund. 97. (3).

‡ 4 Durnf. & East, 646. 4 Price, 240. and see O. Bridg. 188.

§ 2 Ld. Raym. 1581, 2. 2 Str. 885, 6. S. C. 1 Wils. 48. 2 Str. 1185. S. C. 1 East,

111.

1 Ante, 770.

2 O. Bridg. 188. 2 Ld. Raym. 1521. 1584. 2 Str. 887. S. C. *Id.* 1124. S. P. 1 East, 111.

1 *Id.* 474.

2 O. Bridg. 3. 558.

3 *Id.* 88.

4 8 Price, 256.

demurrer.^p In the King's Bench, a special verdict must be set down in the paper for argument, within *four* days,^q and cannot be set down afterwards, without leave of the court:^r and, in the Common Pleas, the clerk of the dockets makes *six* copies of the special verdict, *viz. four* for the judges, and *two* for the serjeants on each side.^s After the court have given their opinion, a rule is drawn up for the delivery of the *postea* to the prevailing party; upon which he is immediately entitled to tax his costs, and take out execution, without a rule for judgment: but the other party may have a rule, which should be duly served, to be present at taxing costs.

Another method of finding a species of special verdict, is when the jury find a verdict generally for either party, but subject nevertheless to the opinion of the court, on a *special* case, stated by the counsel on both sides, with regard to a matter of law; which has this advantage over a special verdict, that it is attended with much less expense, and obtains a speedier decision; the *postea* being stayed in the hands of the officer of *nisi prius*, till the question be determined, and the verdict is then entered for the plaintiff or defendant,^t as the case may happen. The practice of granting cases is not of very modern date, there being an instance as far back as the reign of Charles the Second, where a point was reserved at *nisi prius* for the opinion of the court, on a special case.^u But as nothing appears upon the record but the general verdict, the parties are precluded thereby from the benefit of a writ of error, if dissatisfied with the *judgment of the court upon the point of law:^v The courts [*930] therefore will sometimes, and particularly if they are divided in opinion on the point of law, give the parties leave, if they can agree, to turn the case into a special verdict, in order that the point may be decided on a writ of error.^w The court of King's Bench will take no cognizance of a special case, reserved upon the trial of an indictment at the sessions.^x And they have no jurisdiction to review the judgment of the quarter sessions, except on a case sent up for their consideration: and therefore, where the sessions, on an appeal, having heard the witnesses on one side, had refused to hear those on the other side, on the ground that their testimony had been prefaced by observations on the part of the advocate, contrary to their usual practice, the court refused to grant a *mandamus* to re-hear the appeal.^y But it has been usual to reserve special cases upon convictions for penalties, on an appeal at the sessions, as well as in cases of settlement; and the court will take cognizance of them, when accompanying the proceedings removed by *certiorari* in the King's Bench.^b

In a special case, as in a special verdict, the facts proved at the

^p *Ante*, 796, &c.

^q 1 Bur. in pref. IV.

^r Imp. K. B. 427.

^s Imp. C. P. 425.

^t Barnes, 451.

^u 1 Lev. 236. and see 3 Durnf. & East, 131.

^v 3 Blac. Com. 378.

^w 15 East, 501. 6 Taunt. 246. 1 Marsh. 577. S. C.

^x 13 East, 95.

^y 4 Barn. & Ald. 86. and see 2 Chit. Rep. 385.

^b 15 East, 333. 345. and see 2 Chit. Rep. 284.

trial ought to be stated, and not merely the evidence of facts;^a and it is drawn and settled in like manner, by the counsel: and if any difference arise about a fact at the trial, the opinion of the jury is taken, and the fact stated accordingly.^d If a verdict be found for the plaintiff with *nominal* damages, subject to the opinion of the court on a special case to be drawn up by the plaintiff, if he refuse to prepare it, the case cannot be set down for argument, nor the plaintiff compelled to complete it; but the defendant may apply to set aside the verdict, and have a new trial.^e Where the defendant had neglected to settle the case reserved on a *quo warranto*, a rule *nisi* was granted, for the *postea* to be delivered over to the prosecutor; and that he should be at liberty to enter up judgment thereon.^f And so, where a plaintiff obtained a verdict, subject to a special case, and the defendant did not obtain the signature of a serjeant to such case, in order to delay its being argued, the court of Common Pleas directed the *postea* to be delivered to the plaintiff.^g For the argument of a special case, the same steps must be taken as for that of a special verdict, except that it is not entered of record. But it is a rule in the King's Bench, that "all special cases to be set down by the clerk of the papers to be argued, must be entered within the four first days of the term next after the trial, at which such special cases shall have been reserved; and that such special cases shall never be set down for argument, on any of the four last days of term."^h In arguing a special case, the counsel are not permitted to go out of it; [*931] and the courts must judge upon it as stated.ⁱ If it be misstated, the parties must apply to amend; or if it be so defective that the court are not able to give judgment, they will grant a new trial, in order to have it re-stated.^k

On the trial of an issue in the King's Bench, a case was made, and afterwards argued in court, but the facts not being sufficiently stated, so as the court could give judgment according to the justice of the cause, it was recommended to the parties, and accordingly they agreed, to go to a new trial, when the plaintiff was nonsuited: and the question being about costs, whether the master should tax the common costs of a nonsuit, or take into his consideration all the former proceedings; upon motion for the court's direction to the master, it was ordered, that he should tax the defendant his costs upon the whole, as well with relation to the first trial, as the last.^l From the statement of this case, it does not appear whether, upon granting a new trial, any thing was said about the costs of the former trial, or whether they were directed to abide the event of the suit: If they were not, it seems from subsequent cases,^m that at this day they would not have been allowed. But where, after the argument of a special case, the court directed a new trial, because the case was insufficiently stated, and the defendant, without going to trial again,

^a 2 Wils. 163.

^d 1 Bur. *in pref.* IV.

^e 6 Moore, 53.

^f 2 Chit. Rep. 398.

^g 8 Taunt. 421. 2 Moore, 478. S. C.

^h R. M. 38 Geo. III. K. B.

ⁱ 1 Bur. 617.

^k 1 Str. 300. 3 Durnf. & East, 507. 2 Chit. Rep. 398.

^l 1 Str. 300.

^m 3 Durnf. & East, 507. 6 Durnf. & East, 71.

gave the plaintiff a *cognovit*; the court held, that the defendant was liable to pay the costs of the former trial.[†]

It sometimes happens that a point is reserved, or saved by the judge at *nisi prius*, with liberty to apply to the court for a nonsuit or verdict; in which case, the court has been in the habit of considering itself in the situation of the judge, at the time of the objection raised; and a nonsuit or verdict is entered according to their determination, without subjecting the parties to the delay and expense of a new trial.*

The verdict, whether general or special, nonsuit, &c. are entered on the back of the record of *nisi prius*; which entry, from the *latin* word it began with, is called the *postea*.[‡] In the King's Bench, when the cause is tried at the sittings in *London* or *Middlesex*, the *associate delivers the record to the attorney of the party [¹⁷⁹³2] for whom the verdict is given, and he afterwards indorses the *postea*, from the associate's minutes on the panel; but when the cause is tried at the *assizes*, the associate keeps the record till the next term, and then delivers it, with the *postea* indorsed thereon, to the party obtaining the verdict. In either case, the *postea* should be stamped with a *ten shilling* stamp,[§] and marked by the clerk of the *postea*: And there is an old rule of court, requiring the *postea* to be marked in *two* days after it comes to the attorney's hands;[¶] but now, it is deemed sufficient to mark the *postea*, at any time before the costs are taxed.[•]

In the Common Pleas, when the cause is tried in *London* or *Middlesex*, the associate keeps the record in his custody, till the *quarto die post* of the return of the *habeas corpora juratorum*, and in the mean time indorses the *postea* on the back of it. And it is a rule in this court, that "every clerk of assize, and associate to the lord chief-justice, shall make returns of all *postea*s, upon records issuing out of this court, whereupon any proceedings have been, by virtue of any writ of *nisi prius*, *distingas*, or *habeas corpora juratorum*, and cause the same to be delivered to the prothonotaries, upon the *quarto die post* of the return of the writ of *nisi prius* in bank, on pain of forfeiting the sum of twenty pounds; and shall take the fees due to them respectively, for the return of every such *postea*."[‡] And where final judgment is signed upon

* 6 Durnf. & East, 144. *Post*, 947.

• 1 Bos. & Pul. 339. and see Barnes, 451. 455. 460. 1 Campb. 91. 241. 475. 545. 549. 2 Campb. 4. 79. 195. 427. 1 Stark. *Ni. Pri.* 14. Holt *Ni. Pri.* 48. 9. 208. 9. 2 Marsh. 138. 9 Price, 288. 2 Dowl. & Ry. 462.

‡ For the form of the *postea* on a verdict for the plaintiff, in *assumpsit*, *debt*, *case*, *replevin*, *trespass*, and *ejectment*, see Append. Chap. XXXVII. § 1, &c. and

for the defendant, on a nonsuit or verdict in *assumpsit*, &c. *Id.* § 29. &c.

§ Stat. 48. Geo. III. c. 149. *Sched. Part II.* § III. 55 Geo. III. c. 184. *Sched. Part II.* § III.

¶ R. T. 2 Jac. I. reg. 2. K. B.

• 1 Crompt. 277.

‡ R. E. 2 Jac. II. C. P. And there is a particular rule in that court, as to the delivery of *postea*s in *qui tam* actions. R. E. 34 Car. II. reg. 1. C. P.

† Where, after a verdict for a sum of money, two questions were raised for the opinion of the court on a special case, and one of them at the time of argument was withdrawn by mutual consent: Held, that the plaintiff, retaining his verdict for the sum of money, was entitled to the costs of the special case, though the defendant succeeded on the point that was argued. 2 Bingh. 330.

postea, or *inquisitions* upon writs of inquiry, such *postea* or *inquisitions* shall immediately be left with the clerk of the judgments; and shall not afterwards be taken out of the office, without leave of the court.^a The *postea*, in a late case, having been improperly obtained from the associate by the plaintiff's attorney, who immediately taxed his costs, and signed final judgment, on the *fourth* day of term; the court notified, that for the future, the *postea* should not be delivered out till the morning of the *fifth* day of term.^x

On a motion for a new trial, the *postea* was brought into court, and after the new trial had been denied, the *postea* could not be found; the court on debate ordered a new one to be made out, from the record above, and the associate's notes.^y If the *postea* be wrong, [*933] it may be amended by the plea roll, by the memory or notes of the judge, or by the notes of the associate or clerk of assize.^z And where a general verdict had been given on two counts, one of which was bad, and it appeared by the judge's notes, that the jury calculated the damages on evidence applicable to the good count only, the court of Common Pleas amended the verdict, by entering it on that count, though evidence was given applicable to the bad count also.[†] So, after verdict in *ejectment* for a *messuage and tenement*, the court in a late case gave leave to enter the verdict, according to the judge's notes, for the *messuage* only, pending a rule to arrest the judgment, without obliging the lessor of the plaintiff to release the damages.^b But the application to amend the verdict by the judge's notes, must be made to the judge who tried the cause, and not to the court.[‡] And the court will not alter a verdict, unless it appear on the face of it, that the alteration would be according to the intention of the jury;^d nor will they, at a distance of time after the trial, amend the *postea*, by increasing the damages given by the jury, although all the jurymen join in an affidavit, stating their intention to have been, to give the plaintiff such increased sum, and that they conceived the verdict they had found was calculated to give him such sum.^e So, where a general verdict was taken for the plaintiff, the court of King's Bench refused to entertain an application for entering the verdict on particular counts, according to the evidence on the judge's notes, after a lapse of *eight* years, and after the judgment had been reversed on error, for a defect in one count.^f And where the jury, in an action of *debt* on the statute 2 & 3 Edw. VI. c. 13. which gives *treble* value for not setting out tithes, found, on the general issue of *nil debet*, that the defendant owed a certain sum, being the amount of the *single* value,

^a R. T. 13 Geo. II. *reg.* 2. C. P. and see R. T. 29 *Car. II. reg.* 5. C. P.

^x 1 Brod. & Bing. 298. 3 Moore, 643. S. C.

^y 2 Str. 1364.

^z *Ante*, 770.

[†] 1 Bos. & Pul. 329.

^b 8 East, 357.

^c 1 Obit. Rep. 283. *Ante*, 770. (b.)

^d 1 H. Blac. 78.

^e 2 Durnf. & East, 281. but see 1 Bur. 383.

^f 1 Barn. & Ald. 161.

[†] See also 3 Bingh. 334. C. B.

[‡] But see 3 Bingh. *ut supra*, the remarks of Park, J.

the court held that the *postea* could not be amended, by entering a verdict for the *treble* value.^s In an action by one defendant in *assumpsit*, against a co-defendant for contribution, the *postea* is evidence to prove the amount of the damages;^b but the indorsement of the master's *allocatur* is not, it seems, sufficient to entitle the plaintiff to recover half the costs, without producing the judgment.ⁱ

^s 2 Chit. Rep. 351. but see 1 Bing. 182. the insertion of nominal damages.
 where the jury having found the treble value in a similar action, on a writ of inquiry, the inquisition was amended, by ^b 2 Stark. N. Pri. 364. and see 9 Price, 359.
ⁱ 2 Stark. N. Pri. 364.

CHAP. XXXVIII.

OF NEW TRIALS; AND ARREST OF JUDGMENT, &c.

AFTER a general verdict, or upon a writ of inquiry after judgment by default,^a it is incumbent on the prevailing party, in the King's Bench, to enter a rule for judgment *nisi causa*, on the *postea* or inquisition, with the clerk of the rules: And a rule for judgment is necessary, when a verdict is taken by consent, subject to the award of an arbitrator, as to the *quantum* of the demand.^b This rule expires in *four days exclusive*^c after it is entered; unless the rule be entered on the last day of term, or within four days after; during which four days, it is the practice to enter these rules as of the last day of term:^d and *Sunday*,^e or any other day on which the court doth not sit, is not reckoned one of the four days.^f At the expiration of four days exclusive after entering such rule, if no sufficient cause be shewn to the contrary, judgment may be signed.^g The rule for judgment ought not to be entered before the day in bank: and it is not necessary, if the plaintiff be nonsuited; for in that case, as he is out of court, judgment may be entered immediately after the day in bank.^h If there be a verdict for the defendant, and no rule for judgment given for *four terms*, a term's notice is not necessary of the plaintiff's intention to proceed by giving the rule; but he may give it of course, and sign judgment after the four days are expired: for there is no act to be done by the other party.ⁱ In the Common Pleas, there is no rule for judgment: but the prevailing party waits till after the appearance day, or *quarto die post* of the return of the *habeas corpora juratorum*,^k before he signs

^a 1 Salk. 399. 1 Str. 425.

^b 4 East, 310.

^c 3 Salk. 212. 215. 6 Mod. 241. 13 East, 21.

^d *Rex v. Keene and others*, H. 26 Geo. III. K. B.

^e 4 Bur. 2130. and see 11 East, 272. *Id.* (b.) 13 East, 21.

^f 13 East, 21. 1 Chit. Rep. 562.

^g R. E. 5 Geo. II. reg. 3. (a.) K. B.

^h *Id. ibid.*

ⁱ *Per Muster Forster*, Imp. K. B. 421.

^j Maule & Sel. 500. 1 Chit. Rep. 317. (a.)

^k Barnes, 443. Pr. Reg. 410. S. C. Barnes, 445, 6. Pr. Reg. 410, 11. S. C.

It is said in 1 Sel. Pr. ed. 1792. p. 496, that in the Common Pleas, the prevailing party must wait the same time (four days *exclusive*,) as in the King's Bench, which is allowed the other side to move for a new trial, or in arrest of judgment: but this *dictum* is not supported by the authorities referred to above; and in the case of *Thomas v. Ward*, 2 Bos. & Pul. 393. the court of Common Pleas held, that the rule that final judgment cannot be signed till *four days* after the return of the *habeas corpora juratorum*, does not extend to a case where the term closes before the four days are expired.

final judgment; unless *the *habeas corpora* be returnable on [*935] the *first* or *last* general return day: In the former case, final judgment cannot be signed till the expiration of the first four days in full term: In the latter, it may it seems be signed in the evening of the last day of term, being the appearance day of the return of the writ.¹

Within the time limited by the rule for judgment in the King's Bench, or practice of the court, as above stated, in the Common Pleas, the plaintiff may move the court to set aside a nonsuit, verdict or inquisition, and have a new trial or inquiry; or for judgment *non obstante veredicto*: Or the court may order a verdict to be entered for the plaintiff, where the judge directed a nonsuit in an undefended cause, with liberty for the plaintiff to move to enter a verdict.² And the defendant may move to set aside a verdict or inquisition, and have a new trial or inquiry, or (after a point reserved,) that a nonsuit may be entered;³ or he may move in arrest of judgment: and either party may move for a repleader, or *venire facias de novo*. But the defendant cannot in strictness move to enter a nonsuit, but only for a new trial, unless leave was given him at the trial:⁴ and therefore, when a legal objection is taken at the trial, and over-ruled by the judge, without reserving the point, though the court are afterwards of opinion that the objection was a good ground of nonsuit, they will grant a new trial only, and not permit a nonsuit to be entered.⁵

The first instance to be met with in the books, of a new trial on the evidence, was in the case of *Wood and Gunston*, *A. D.* 1665.⁶ But *Holt*, Ch. J. seems to have been of opinion, that new trials were more ancient, from the challenge to be met with in the old books, that the juror had before given a verdict in the same cause:⁷ Yet it does not from thence follow, that the court granted a new trial upon the evidence; for it might appear to be a mis-trial upon the record, or there might be other reasons for awarding a *venire facias de novo*.⁸

But whatever might have been the origin or the practice, trials by jury in civil causes could not subsist now, without a power somewhere to grant new trials. If an erroneous judgment be given in point of *law, there are many ways to review and set it right. [*936] When a court judges of facts upon depositions in writing, their sentence or decree may many ways be reviewed and set right. But a general verdict can only be set right by a new trial; which is no more than having the cause more deliberately considered by another jury, when there is a reasonable doubt, or perhaps a certainty, that justice has not been done. The writ of *attaint* is now a mere sound in every case; in many it does not pretend to be a remedy. There

¹ 2 Bos. & Pul. 393.

² 4 Barn. & Ald. 413. *Ante*, 918.

³ 9 Price, 288. 2 Dowl. & Ryl. 462. *Ante*, 917, 18. 931. Append. Chap. XXXVIII. § 1, 2.

⁴ 2 Chit. Rep. 271, 2. *Ante*, 917, 18. 931.

⁵ 1 Barn. & Ald. 252. but see 8 East,

580. 2 Moore, 458, 9. 1 Barn. & Cres. 94. 2 Dowl. & Ryl. 198. 8. C. *Ante*, 917, 18. 931.

⁶ 4 Sty. Rep. 462. 466. 1 Str. 392.

⁷ 2 Salk. 648. and see 6 Durnf. & East, 622, 3.

⁸ 2 Str. 995.

are numberless causes of false verdicts, without corruption or bad intention of the jurors: They may have heard too much of the matter before the trial, and imbibed prejudices without knowing it. The cause may be intricate: The examination may be so long, as to distract and confound their attention. Most general verdicts include legal consequences, as well as propositions of fact: In drawing these consequences, the jury may mistake, and infer directly contrary to law. The parties may be surprised, by a case falsely made at the trial, which they had no reason to expect, and therefore could not come prepared to answer. If unjust verdicts, obtained under these and a thousand like circumstances, were to be conclusive for ever, the determination of civil property in this method of trial, would be very precarious and unsatisfactory.¹

It was not formerly usual to grant a new trial in *ejectment*;² or after a trial at bar,³ nonsuit,⁷ or two *concurring* verdicts;² but for the sake of obtaining justice, it may be now had in these as well as in other cases.⁴† When there are two *contrary* verdicts, it is not of course to grant a third trial, but the courts in their discretion will grant or refuse it, according to circumstances; there being no rule, either at law or in equity, which entitles the losing party in that case to the benefit of a third trial, if the second verdict be satisfactory to the court.⁵ In an *inferior* court, it is said, a verdict cannot be set aside, and a new trial had, upon the merits, but only for irregularity:⁶ And the court of King's Bench would not interfere by *mandamus*, to compel an inferior court to grant a new trial, in a cause wherein, it was alleged, injustice had been done to one of the parties.⁴ An [*937] inferior court, however, has power to set aside a regular interlocutory judgment, in order to let in a trial of the merits.⁶

The principal grounds or reasons for setting aside a verdict or nonsuit, and granting a new trial, are first, the want of due notice of trial:⁷ but if the defendant appear and make defence, he shall not have a new trial on that ground.⁵ Secondly, that there is a material *variance* between the issue or paper-book delivered, and the record of *nisi prius*:⁸ but the courts will not set aside a verdict on this ground, unless the variance be material to the point in issue;⁴

¹ 1 Bur. 393.

² 2 Salk. 648. Pr. Reg. 408.

³ 7 Mod. 37. 156. 2 Salk. 650. 8. C.

⁴ 1 Blac. Rep. 532. Pr. Reg. 411. Barnes, 317.

⁵ 6 Mod. 22. 2 Salk. 649. 1 Str. 692.

⁶ 2 Str. 1105. 4 Bur. 2224. in *ejectment*; Sty. Rep. 462. 466. 1 Str. 584. 2 Ld. Raym. 1358. 8. C. 2 Str. 1105. 1 Bur. 395. after a *trial at bar*; 4 Bur. 1986. 2 Blac. Rep. 698. 3 Wils. 146. 338. after a *nonsuit*; and 4 Bur. 2109. 1 Durnf. & East, 171. after two *concurring* verdicts.

⁷ 2 Blac. Rep. 963.

⁸ 1 Salk. 201. 2 Salk. 650. 1 Str. 113. 392. 499. Fort. 198. Say. Rep. 202. 1 Bur. 572. Doug. 380.

⁹ 2 Chit. Rep. 250.

¹⁰ 1 Bur. 571.

¹¹ Bul. Ni. Pri. 327. 3 Price, 72.

¹² 2 Salk. 646.

¹³ Barnes, 475, 6. And for the effect of a variance between the issue and *nisi prius* record, see 8 Taunt. 634. 2 Barn. & Ald. 472. 1 Chit. Rep. 277. 8. C. Id. 277, 8. (a.) *Ante*, 776. 784.

¹⁴ Barnes, 464. 475, 6, 7. 2 Str. 1131. Say. Rep. 154.

† After plea in abatement found against a defendant, the court of K. B. refused to grant a new trial, even on payment of costs. 4 Dowl. & Ryf. 241.

or if a defence was made at the trial.^k Thirdly, for want of a proper *jury*; as where they are not duly returned.^l But it is no ground for a new trial, that the attorney for the defendant was the under-sheriff, who had the summoning of the jury.^m So where, upon the trial of an information for a libel, only *ten* special jurymen appeared, and *two talesmen* were sworn on the jury; it was decided to be no ground for a new trial, that two of the non-attending special jurymen named in the panel, had not been summoned, though it appeared that this fact was unknown to the defendant, until after the trial.ⁿ And the disallowing of a challenge, we have seen,^o is not a ground for a new trial, but for a *venire de novo*. Fourthly, the misbehaviour of the prevailing *party*, towards the jury or witnesses,^p is a good ground for a new trial. And where it was sworn, that hand bills, reflecting on the plaintiff's character, had been distributed in court, and shewn to the jury on the day of trial, the court granted a new trial; and would not receive from the jury affidavits in contradiction, though the defendant denied all knowledge of the hand bills.^q But merely desiring a juror to appear, is no cause for setting aside the verdict.^r Fifthly, the courts will sometimes, though rarely, grant a new trial, on account of the unavoidable absence of the *attornies*,^s or *witnesses*,^t or upon the discovery of new and material evidence since the trial;^u or where, upon the facts proved, an inference of law arises on a statute, of which the parties were not then aware.^x But a new trial is never granted *for the default or omission of the parties, their [*938] counsel or attornies, in not coming prepared with, or going into evidence which they were apprised of, and might have produced at the former trial;^y or upon a suggestion that the party was not apprised of particular evidence, and therefore not prepared to answer it;^z or because a witness has either from inattention, or the want of being prepared, made a mistake in giving his evidence;^a or on account of the manner in which he was sworn;^b or of an objection to his competency, discovered after the trial.^c And where a cause was taken out of its turn, and tried as an undefended cause, the counsel for the defendant objecting thereto, and declining to appear, the court, we have seen, refused to grant a new trial, though on payment of costs, without an affidavit of merits.^d Sixthly, if the *witnesses*, on whose testimony the verdict was obtained, have

^k Barnes, 445. 2 Wils. 160.

^l 4 Durnf. & East, 473. *Ante*, 630.

^m 1 Smith R. 304.

ⁿ 4 Barn. & Ald. 430.

^o *Ante*, 906.

^p 7 Mod. 156.

^q 3 Brod. & Bing. 272.

^r 1 Str. 643.

^s 3 Taunt. 484. 1 Price, 201. 2 Chit. Rep. 269.

^t 2 Salk. 645. 6 Mod. 22. 1 Price, 1. 2 Chit. Rep. 195.

^u 2 Blac. Rep. 955.

^v 7 Taunt. 309.

^w 2 Salk. 647. 653. 6 Mod. 22. 1 Str.

691. 1 Wils. 98. 1 Blac. Rep. 298. 2 Blac. Rep. 802. 3. 1 Durnf. & East, 84. 2 Durnf. & East, 113. 1 Price, 143. but see 8 Taunt. 730. 3 Moore, 58. S. C.

^x 2 Atk. 319. 2 Chit. Rep. 194. 2 Moore, 179. 8 Taunt. 236. S. C. 2 Chit. Rep. 194. 267. but see *id.* 269. 271.

^y Say. Rep. 27. but see 5 Taunt. 277. 1 Bing. 145.

^z 3 Brod. & Bing. 232.

^a 1 Durnf. & East, 717. 1 Bos. & Pul. 429. (a).

^b 5 Barn. & Ald. 907. 1 Dowl. & Ry. 553. S. C. *Ante*, 872, 3. and see 2 Chit. Rep. 269, 70.

been since convicted of *perjury* in giving their evidence, the courts will grant a new trial;^c or if a probable ground be laid, to induce the court to believe that the witnesses are perjured, they will stay the proceedings, on the finding of a bill of indictment against them for perjury, till the indictment is tried.^c The court of Common Pleas, in one case, granted a new trial, where the testimony of witnesses, on which a verdict had proceeded, was founded on and derived its credit from particular circumstances, and those circumstances were afterwards clearly falsified by affidavit.^f But in general, the finding of a bill of indictment for perjury or conspiracy,^g is no ground for staying the proceedings, before conviction; it being found on *ex parte* evidence.^h And the court will not grant a new trial, on the mere affidavit of one party, contradicting the witnesses on the other side.ⁱ

A seventh ground of moving for a new trial is the misdirection of the judge;^k or his admitting or refusing evidence contrary to law.^l But it is not a misdirection, if the judge refer the jury to their own [*939] knowledge of any particular facts which have been proved, as matter of illustration only, and not as matter of evidence.^m And the courts will not set aside a verdict, on account of the admission of evidence which ought not to have been received, provided there be sufficient without it, to authorize the finding of the jury.ⁿ nor is it any ground for granting a new trial, that a witness called to prove a certain fact was rejected, on a supposed ground of incompetency, when another witness who was called, established the same fact, which was not disputed by the other side, and the defence proceeded upon a collateral point, on which the verdict turned.^o So, the courts will not set aside a nonsuit, on the ground that the case ought to have been submitted to the jury, unless this was desired on the part of the plaintiff, at the trial of the cause.^p And if, upon the judge's directing the jury to give nominal damages, the plaintiff elect to be nonsuited, the court of Common Pleas will not set aside the nonsuit, and grant a new trial, on the ground of the misdirection of the judge.^q It also seems, that if a *junior* counsel at *nisi prius* take a well founded objection, which his leader gives up, that court will not entertain it, in discussing a rule for a new trial or nonsuit on another ground.^r

Eighthly, a new trial may be moved for on account of the error or mistake of the *jury*, in finding a verdict without, or contrary to evidence.^s But where there is evidence on both sides, it is not usual

* *Benfield v. Petrie* and *Petrie v. Milles*, M. 22 Geo. III. K. B. Adm. *Ford v. Yates*, E. 22 Geo. III. K. B.

¹ 1 Bos. & Pul. 427. and see 3 Bur. 1771.

² 1 Bing. 339.

³ *Benfield v. Petrie* and *Petrie v. Milles*, M. 22 Geo. III. K. B. and see *Aysheford v. Charlotte*, H. 25 Geo. III. K. B. 4 Maule & Sel. 140. 2 Price, 3. 2 Moore, 80. 8 Taunt. 182. S. C.

⁴ 4 Taunt. 640. and see 9 Price, 89. but see *id.* 76.

⁵ 2 Salk. 649. 2 Wils. 273.

⁶ 6 Mod. 242.

⁷ 4 Maule & Sel. 532.

⁸ 1 Taunt. 12.

⁹ 3 East, 451.

¹⁰ 1 Taunt. 10. and see 6 Taunt. 336. *Ante*, 909.

¹¹ 3 Taunt. 229. and see 9 Price, 291.

¹² *Id.* 531. and see 4 Taunt. 779. *Ante*, 909.

¹³ 1 Bur. 12. 54. 2 Bur. 665. 936. 3 Barn. & Ald. 692.

to grant a new trial;¹ unless the evidence for the prevailing party be very slight, and the judge declare himself dissatisfied with the verdict.² The court of Common Pleas, in one instance, refused to grant a new trial in a writ of *right*, though the verdict was final and conclusive;³ but in a late case, which was an issue under an inclosure act, they granted a new trial, on payment of costs, although there was evidence on both sides, and they did not think the verdict was wrong; it appearing that the question was involved in great doubt and obscurity, the property of considerable value, and that the right would have been bound for ever by the verdict.⁴ In that case, however, the jury having again found a verdict the same way, the court refused to grant a second new trial, although there was conflicting evidence, and the judge who last tried the cause, thought the evidence against the "verdict preponderated." Ninthly, [*940] the misbehaviour of the jury in casting lots for their verdict,⁵ &c. is a good ground for a new trial. But the dispersion of the jury, with the permission of the judge, during the interval of an adjournment, in case of a misdemeanour, does not vitiate their verdict, when there is no suggestion of their having been improperly practised upon in the *interim*.⁶ And the courts will not receive an affidavit of partiality and prejudice in one of the jurymen, from the unsuccessful party,⁷ or of their misbehaviour from any of the jurymen themselves, in all of whom such conduct is a very high misdemeanour;⁸ nor will they suffer the jury to explain by affidavit the grounds of their verdict, or to shew that they intended something different from what they found.⁹ And an admission by jurymen, that the verdict was entered by mistake, made after they had separated, though on the day of trial, is not a sufficient ground for a new trial.¹⁰ In general, the assent of all the jury to the verdict pronounced by the foreman, in their presence and hearing, is to be conclusively inferred; and no affidavit can in any case be admitted to the contrary: But if all the jury were not present, when a verdict of guilty was delivered, and it is therefore uncertain whether they all heard the verdict pronounced by the foreman, the court will, with the consent of the defendant, grant a new trial.¹¹ Tenthly, a new trial may be had for excessive damages;¹² but in that case, the damages ought not to be weighed in a nice balance, but must be such as appear at first blush to be outrageous, and indicate passion

¹ 2 Str. 1106. 1142. 1 Wils. 22. 3 Wils. 47. 3 Taunt. 1. 2 Price, 282.

² Say. Rep. 264. and see 3 Wils. 38, 9.

³ Chit. Rep. 271. 6 Price, 146.

⁴ 2 Blac. Rep. 941.

⁵ 3 Taunt. 91. and see 1 Price, 278.

⁶ 3 Taunt. 232.

⁷ 2 Salk. 645. 1 Str. 642. Barnes, 438. 441. Bul. *Ni. Pri.* 326.

⁸ 2 Barn. & Ald. 462. 1 Chit. Rep. 401.

S. C.

⁹ 7 Price, 203.

¹⁰ Say. Rep. 100. 1 Durnf. & East, 11. 2 Blac. Rep. 1299. 1 New Rep. C. P. 326.

¹¹ 8 Taunt. 26. 1 Moore, 455. S. C. 3 Brod.

& Bing. 272.

¹² 5 Burr. 2667. 2 Blac. Rep. 803. 2 Durnf. & East, 281. but see Cas. Pr. C. P. 66. 1 Bur. 383. 9 Price, 134. *semb. contra.*

¹ 2 Chit. Rep. 268.

² Stark. *Ni. Pri.* 111.

³ 1 Str. 692. Barnes, 436. 1 Bur. 609. 2 Wils. 160. 205. 244. 252. 405. 3 Wils. 18. 62. 2 Blac. Rep. 929. 942. 1327. Cowp. 230. 1 Durnf. & East, 277. 4 Durnf. & East, 651. 5 Durnf. & East, 257. 7 Durnf. & East, 529. 2 Bos. & Pul. 224. 6 East, 244. 11 East, 23. 5 Taunt. 277. 442. 1 Marsh. 139. S. C. 1 Chit. Rep. 729. (*u.*)

or partiality in the jury: And when a new trial is granted for excessive damages, the former verdict stands as a security, in the mean time, for the damages which may be given on the second trial.¹ It is not usual, however, to grant a new trial for *smallness* of damages;² [*941] though inquisitions, on writs of inquiry, have been sometimes set aside on that ground.¹ Lastly, it is a general rule, not to grant a new trial, except for the misdirection of the judge,³ or where a point has been saved at the trial,⁴ in a *penal*,⁵ *hard*, or *trifling*⁶ action, after a verdict for the defendant; nor after a verdict for the plaintiff, where the defence is unconscionable,⁷ and the verdict is found according to the justice and honesty of the case.⁸ But the statutes 2 & 3 Edw. VI. c. 13. for not setting out tithes,⁹ and 11 Geo. II. c. 19. § 3, for assisting a tenant in carrying away his goods to prevent a distress,¹⁰ are remedial acts; and in actions thereon, the court will grant a new trial for a mistake of the jury.¹¹ On moving for a new trial, the motion was acceded to, on condition that the defendant should procure a bond from third persons, to secure the sum to be recovered by the plaintiff and costs, in case a similar verdict should be given on the second trial; and the court of Common Pleas held, that this bond was properly stamped with a 35s. stamp:¹² but they would not amend the rule for a new trial, after such bond had been entered into, by providing that the action should not abate by the death of the defendant.¹³

A new trial cannot be granted in *civil* cases, at the instance of one of several defendants;¹⁴ nor for a *part* only of the cause of action.¹⁵ And therefore, where one of four issues was found against evidence, the court granted a new trial, not only as to such issue, for that they said could not be, but for the whole.¹⁶ But then, the issue found against evidence must be a material one; for if two of three issues [*942] are *found against evidence, yet if the material issue in the

¹ 7 Durnf. & East, 529. but see 8 Taunt. 714, 15.

² 2 Salk. 647. 2 Str. 940. 1051. Doug. 509. but see Barnes, 448, 9. 455, 6. in which latter case it is said, that where a demand is certain, as on a promissory note, the court will set aside a verdict for too small damages, but not where the damages are uncertain: and it is observable, that the cases referred to in 2 Str. 940. 1051. were of this latter description.

¹ *Ante*, 630.

³ 4 Durnf. & East, 753. 5 Durnf. & East, 19. 6 East, 316. (b.) 1 Marsh. 555.

⁴ 1 Bos. & Pul. 338, 9. *Ante*, 931. 935.

⁵ 2 Str. 899. 1238. 1 Wils. 17. Barnes, 435. 466. 3 Wils. 59. 2 Blac. Rep. 1226. *Hooper v. Cobb*, T. 22 Geo. III. K. B. 10 East, 268. 1 Campb. 450. S. C. 4 Maule & Sel. 338. 2 Chit. Rep. 273.

⁶ 2 Salk. 644. 648. 653. 1 Bur. 12. 54. 2 Bur. 664. 3 Bur. 1306. 2 Blac. Rep. 851. Cowp. 37. 1 Marsh. 555. And an action is considered as trifling in this respect, when the sum to be recovered is under 20*l*. *Taylor v. Green*, H. 38 Geo. III. K. B.

5 Taunt. 537. C. P. When it amounts to that precise sum, the court will grant a new trial. *Dyball v. Duffield*, M. 59 Geo. III. K. B. 1 Chit. Rep. 265. (a.) And a new trial may be granted, in *trespass* for cutting down trees, though the damages be under £20, if the object of the action was to try a right of a permanent nature. 1 Chit. Rep. 265. See also the cases referred to by Mr. Evans, in his edition of Salkeld, 2 V. 644. (a.) on the subject of new trials.

⁷ 2 Salk. 644. 646, 7. 1 Bur. 12. 54. 2 Bur. 664. 4 Durnf. & East, 468.

⁸ 2 Bur. 936. 2 Wils. 306. 362. 2 Blac. Rep. 1221. 2 Durnf. & East, 4. 4 Durnf. & East, 468. 1 Bos. & Pul. 338.

⁹ 6 Taunt. 297.

¹⁰ 9 Price, 301.

¹¹ 8 Taunt. 712.

¹² *Id.* 714, 15.

¹³ 3 Salk. 362. 12 Mod. 275. 2 Str. 814.

¹⁴ 2 Bur. 1224. 1 Blac. Rep. 298. S. C. and see 2 Str. 814. 3 Wils. 47.

¹⁵ *Rex v. Pool*, E. 1734. Bul. Ni. Pri. 326.

cause be agreeable to evidence, the court will not grant a new trial.^b And where two issues were joined between the parties, both of which were found for the plaintiff, and upon moving for a new trial, the judge before whom the cause was tried, certified the verdict as to one of the issues to be contrary to evidence, but as to the other issue, certified it to be right; the court of Common Pleas, upon hearing counsel on both sides, were of opinion that the verdict could not be severed, and being right in part, must stand.^c If a new trial be granted, because a judge has improperly nonsuited the plaintiff, it must take place upon the whole record, unless there be some agreement between the parties to the contrary: But there may be cases, in which the new trial may be restrained to a particular part of the record; as if the judge give leave to move on one point or part only, upon a stipulation between the judge and the counsel, that he shall not move on any thing else; or if, on the evidence, the court above think that justice has not been done, and that they shall do more injustice by settling the matter at large again, they may restrict the parties to certain points on the second trial.^d

In *criminal cases*, affidavits of fresh facts are not in general admissible, on a motion for a new trial, unless there was some surprise on the defendants at the trial.^e And no new trial can be granted, where the defendant has been acquitted,^f although the acquittal was founded upon the misdirection of the judge.^g But there is an exception to this rule in the case of a *quo warranto*, wherein a new trial has been granted, after verdict for the defendant, against the weight of evidence.^h And where the defendant has been acquitted on an indictment for not repairing a road, &c. the court will, under very special circumstances, suspend the entry of judgment, so as to prevent a plea of *autre fois acquit*, and enable the parties to have the question re-considered upon another indictment, without the prejudice of a former judgment.ⁱ So, the court will not grant a new trial where the defendant has been convicted on an indictment for felony;^k but after a conviction for a misdemeanor, a new trial may be granted, at the instance of the defendant, where the justice of the case [*943] requires it.^l And where several defendants are tried at the same time for a misdemeanour, and some are acquitted and others convicted, the court may grant a new trial as to those convicted, if they think the conviction improper.^m But it is a rule, that all the defendants convicted upon an indictment for a misdemeanour, must be present in court, when a motion is made for a new trial on behalf of any of them, unless a special ground be laid for dispensing with their attendance.ⁿ

^b *Dexter v. Barrowby*, E. 25 Geo. II. Bul. N. Pri. 326.

^c *Barnes*, 436. but see *id.* 468.

^d 4 Taunt. 556. *per Gibbs*, J.

^e 2 Chit. Rep. 278.

^f 6 East, 315. 4 Maule & Sel. 337. 1 Barn. & Ald. 63. 2 Chit. Rep. 282. S. C. 1 Barn. & Ald. 64. (d). 67. (a). 1 Chit. Rep. 352. 1 Chit. Cr. Law, 657.

^g 1 Stark. N. Pri. 516.

^h 2 Durnf. & East, 484. 6 East, 316. in

notis. 4 Maule & Sel. 338.

ⁱ 1 Barn. & Ald. 63. 2 Chit. Rep. 282. S. C. 1 Barn. & Ald. 64. (d). 67. (a). but see 5 Maule & Sel. 392.

^k 6 Durnf. & East, 638. and see 1 Chit. Cr. Law, 654, &c.

^l 6 Durnf. & East, 638. and see 1 Chit. Cr. Law, 654, &c.

^m 6 Durnf. & East, 619.

ⁿ 11 East, 307. 3 Maule & Sel. 9, 10. (a). and see 1 Chit. Cr. Law, 669.

The motion for a new trial must be made, in the King's Bench, within *four days exclusive* after the entry of a rule for judgment.* If it be not made within that time, the party complaining cannot afterwards be heard, on the subject of a new trial;† and there is no difference in this respect between civil and criminal cases;‡ though in the latter, where the court have seen of themselves, or it has appeared to them on the suggestion of counsel, that substantial justice has not been done, they have sometimes interposed after the regular time, and granted a new trial:§ And as the rule for judgment cannot be entered till the return of the *distringas*, a motion for a new trial, of a cause tried at a sitting in term, may be made within *four days* after the return of the *distringas*, and is not confined to the space of *four days* after the trial of the cause.¶ In the Common Pleas, the motion for a new trial must be made within the *first four days* of the term, if the cause be tried in vacation; and cannot be received after the four days, unless where the foundation of the motion is a fact not disclosed to the party till after that time.‡ If the cause be tried in term, the motion must be made before or on the appearance day of the return of the *habeas corpora juratorum*, if returnable, as is usual in actions by *original*, on a general return day:¶ or if returnable on a day certain, then within *four days inclusive* of the return day:§ And it is a rule in that court, that no motion for a new trial shall be entertained, unless *two days* previous notice be given of the motion, to the judge who tried the cause, that he may be enabled to bring down his notes of the evidence, and have [*944] them ready in court at the time when the *motion is made.‡ To give effect to this rule, the serjeants will not move for a new trial, in any cause in which the attorney instructing them to move, has not previously certified to them, that he has *two days* before, given notice of his intention to the judge before whom the cause was tried:‡ And such notice must be given, as well in cases where a point has been reserved at the trial, as in other cases.¶ It is a general rule, that the party shall not move for a new trial, after he has moved in arrest of judgment.‡ This rule, however, extends only to cases where the party has knowledge of the fact, at the time of moving in arrest of judgment; therefore, a new trial was granted after such a motion, on affidavits of two of the jury, that they drew

* Doug. 171.

† 5 Durnf. & East, 436. and see 1 Chit. Rep. 382, 3. (a.) by which it appears, that a new trial cannot be moved after the *four days*, though by consent of the parties.

‡ 5 Durnf. & East, 436. 11 East, 308.

§ 2 Str. 845. 995. 2 Bur. 1189. Doug. 171. 797. 5 Durnf. & East, 436, 7. 1 East, 146. 11 East, 308. and see 1 Chit. Cr. Law, 658.

¶ 2 Barn. & Ald. 613. 1 Chit. Rep. 382.

S. C.

† Barnes, 443. 446. Pr. Reg. 410, 11.

S. C.

‡ *Id. ibid.*

§ Imp. C. P. 434.

¶ R. T. 53 Geo. III. C. P. 4 Taunt. 721.

5 Taunt. 611.

‡ 5 Taunt. 86.

¶ 7 Taunt. 257.

‡ 2 Salk. 647. 1 Bur. 334. Pr. Reg. 241.† and see 1 Chit. Cr. Law, 658.

† 4 Barn. & Cres. 160. *accord.* for by moving to arrest the judgment, he affirms verdict. 6 Dowl. & Ry. 281. S. C.

lots for their verdict.^c When a bill of exceptions has been tendered, the court will not grant a motion for a new trial, unless the bill of exceptions be abandoned.^d And where the defendant, pending his motion for a new trial, served the plaintiff with a copy of an allowance of a writ of error, the court of King's Bench held this to be an admission of the facts of the case, and refused to grant a new trial.^e

On a feigned issue, directed by the Chancellor, the application for a new trial must be made in Chancery; as well where the point relates to the admissibility of evidence, as on other grounds.^f And it is in the discretion of that court, to grant or refuse a new trial of an issue directed to be tried at law; for the issue having been originally directed merely to satisfy the conscience of the court, on facts material to the equity of the case, it may order evidence to be received, although not strictly admissible on other trials at law; and it will send the issue down, as often as the result is not satisfactory: or if satisfied that the finding of the jury is agreeable to the equity of the case, it will not order a new trial, on the ground that inadmissible evidence (strictly so called,) has been received below.^g But where, on the trial of an issue decided by the Chancellor, leave is given by the judge to move for a new trial, the motion may it seems be made in the court where the cause was tried.^h And, in an action brought under the Chancellor's order, the application for a new trial may be made either in Chancery,ⁱ or in court where the action is depending.^k

*An affidavit is necessary to move for a new trial, unless [*945] the ground of it appear on the face of the evidence; which affidavit must be made within the *four* days allowed for the motion:^{kk} and the rule, if granted, is a rule to shew cause; on obtaining which, application should be made to the judge who tried the cause, for his report of the evidence; and if he be not of the same court, his clerk will deliver it to the *puisne* judge of the court in which the action is brought. In the King's Bench, it is a rule,^l that "after any rule *nisi* shall be obtained for a new trial, &c. in any cause tried in *London* or *Middlesex*, the attorney for the party obtaining the said rule *nisi* shall, before the time of shewing cause, deliver a note in writing, at the house or chambers of the lord chief justice, specifying the name of the cause, and the time and place where the same was tried, together with the nature of the motion." And where the chief justice died, after a rule *nisi* had been obtained by the defendant for a new trial, without any affidavits being filed, and before the chief justice had reported the evidence thereon, the court said, they could not proceed on this rule; but the defendant must now file affidavits of the facts, and ground his motion on them, without regarding the

^c Pr. Reg. 409. Bul. *Ni. Pri.* 325, 6. *Sed quare*, whether such affidavits would now be received? *Ante*, 940.

^d 2 Chit. Rep. 272. *Ante*, 912.

^e *Bonnel v. Hunt*, T. 15 Geo. III. K. B.

^f 6 Taunt. 444.

^g 2 Price, 399.

^h 2 Chit. Rep. 270.

ⁱ 2 Atk. 319.

^j *Folkes v. Chad and others*, M. 22. Geo.

III. K. B. *Carstairs v. Stein*, T. 55 Geo.

III. K. B. *accord*.

^{kk} 1 Chit. Rep. 383. *in notis*.

^l R. M. 40 Geo. III. K. B.

former rule, and then the plaintiff, on shewing cause, must answer them.^m In the Common Pleas, the court will not hear a rule for a new trial discussed, without having the report of the judge who tried the cause, though there be no dispute about the facts:ⁿ And, in any of the courts, if the judge who tried the cause declared himself satisfied with the verdict, it has been usual not to grant a new trial, on account of its being against evidence: On the other hand, if he declare himself dissatisfied with the verdict, it is pretty much of course to grant it.^o In a case where a judge only reported evidence, without declaring himself to be satisfied or dissatisfied with the verdict, the court were under difficulty how to act: they seemed inclined however to hear it spoken to; but, through their interposition, the parties agreed to abide by the determination of the point of law.^p

The granting of a new trial is either without, or upon payment of the costs of the former trial; or such costs are directed to abide the event of the suit: or nothing is said respecting them. If a new trial be granted for irregularity, the costs of the former trial ought not to be paid;^q and the party applying is in such case entitled to the costs [*946] of the application. When the plaintiff has been nonsuited, by the mistake of the judge in point of law, the courts have in several instances ordered the nonsuit to be set aside, without costs;^r and verdicts have been set aside in a similar manner, when they have been obtained by unfair practice,^s or contrary to law and the judge's direction.^t In general, when the jury have given a perverse verdict, the court will grant a new trial without costs;^u but when a new trial is granted for the error or mistake of the jury, either in finding a verdict without or contrary to evidence, or in giving excessive damages, it is always upon payment of the costs of the former trial.^x Where the cause was taken as an undefended one by mistake,^y the court of King's Bench refused to make the payment of costs a condition of the rule for a new trial.^z And when a new trial is granted to the defendant on payment of costs, the plaintiff should not carry down the cause for trial until they are paid; for if he do, he will have no remedy for the costs of the former trial, even though he should again obtain a verdict.^a The court of Exchequer, however, will not order a prisoner, applying for a new trial on the ground of

^m 1 Kenyon, 370.

ⁿ 5 Taunt. 340.

^o Cas. temp. Hardw. 23. Barnes, 439. Bul. Ni. Pri. 327. and see 6 Price, 146. *Attle*, 939.

^p *Rex v. Phillips*, 23. Geo. II. Bul. Ni. Pri. 327.

^q 12 Mod. 370.

^r 1 Blac. Rep. 670. Say. Costs, 189. 3 Wils. 146. 338. 1 Chit. Rep. 633, 4. (a.)

^s 1 Bur. 352.

^t Say. Costs, 189. 2 Bur. 1224. 1 Blac. Rep. 298. S. C. 1 Blac. Rep. 670. *Gagnier v. Stonehouse*, M. 24 Geo. III. K. B. S. P. 1 Chit. Rep. 633, 4. (a.) 3 Barn. & Ald. 692.

^u *Wilkinson v. Commissioners of Navy*, E. 25 Geo. III. K. B. per Lord Mansfield, Ch. J. and per Lord Ellenborough, Ch. J. in the case of *Howorth v. Samuel*, H. 58 Geo. III. K. B. 1 Chit. Rep. 633, 4. (a.) and see 2 Chit. Rep. 268. 426.

^x 12 Mod. 370. 1 Str. 642. 1 Bur. 12. 393. 2 Burr. 665. *Wilkinson v. Commissioners of Navy*, E. 25 Geo. III. K. B. Pr. Reg. 408. C. P. and see 1 Durnf. & East, 20. 1 Chit. Rep. 633, 4. (a.) 2 Chit. Rep. 426.

^y 1 Chit. Rep. 634. *in notis*.

^z *Doe ex dem. Davie and another v. Had- don*, M. 25 Geo. III. K. B.

excessive damages, to pay the costs of the former trial, before the plaintiff's counsel proceed to shew cause against the rule.^a

On granting a new trial for the misbehaviour of the jury, the costs of the former trial were directed to abide the event of the suit.^b And where one party having obtained a verdict, in the Common Pleas, the court granted a new trial, directing that the costs of the former one should abide the event of the new trial, and on the second trial the verdict was for the other party; it was holden, that the latter was only entitled to the costs of the second trial.^c So when, upon setting aside a verdict for the plaintiff, the costs are directed to abide the event, and then the plaintiff discontinues the action, the defendant is not entitled to the costs of the trial.^d So when, upon setting aside a non-suit, or verdict for the defendant, the costs are directed to abide the event of the suit, though the plaintiff succeed on [*947] the second trial, he is not entitled to the costs of the first: neither is the defendant, in such case, entitled to the costs of the first trial. And although a defendant succeeded upon the first trial by a forgery, the court cannot give the plaintiff, succeeding on the second trial, the costs of both.^e Where the plaintiff, in an action on a policy of insurance, having recovered for an average loss, obtained a new trial, the costs of the first being directed to abide the event, and at the second trial recovered again for no more than an average loss; the court of Common Pleas held, that he was entitled to the costs of one of the trials only, and the defendant to the costs of neither.^f But in general, when the same party succeeds on both trials, he is entitled to the costs of both.^g And when a new trial is ordered, the costs to abide the event, such event means the ultimate event of the cause: and therefore, if the verdict on the second trial be set aside, and on a third trial the ultimate event is the same as at the first, the party will be entitled to the costs of the first trial.^h

When the rule is silent as to costs, the costs of the first trial are not in general allowed, in the King's Bench, whichever way the verdict may go upon the second trial.ⁱ But where the court, after the argument of a special case, directed a new trial, because the case was insufficiently stated,^j or the defendant, after verdict against him, applied for and obtained a rule for a new trial,^k and afterwards the

^a 4 Price, 307.

^b 1 Str. 642. and see Willes, 488.

^c 2 New Rep. C. P. 382. 5 Moore, 309.

^d 1 Barn. & Ald. 566.

^e 4 Taunt. 671.

^f 1 Bing. 393.

^g 8 Durnf. & East, 619. 1 East, 114 (a).
S. C. cited. 1 Bing. 394.

^h 5 Barn. & Ald. 766.

ⁱ Doug. 437. *Sholbred v. Nutt*, M. 23

Geo. III. K. B. 3 Durnf. & East, 507. 6

Durnf. & East, 71. 131. 1 East, 111. 1 H.

Blac. 639. 1 Barn. & Cres. 100. but see 1

Str. 300. 5 Bur. 2694. 6 Durnf. & East,

144. 10 East, 416. 2 Barn. & Ald. 317. 1

Chit. Rep. 19. S. C. *Id.* 633.

^j 6 Durnf. & East, 144. *Ante*, 931.

^k 2 Barn. & Ald. 317. 1 Chit. Rep. 19. S. C.

† So, where the court granted a rule for a new trial, on the application of the defendant in a case where the plaintiff succeeded, and the latter applied to amend his declaration, but discontinued the action, not chusing to pay the costs of the former trial, as the condition of the amendment:—Held, that the defendant was not entitled to the costs of that trial, notwithstanding the plaintiff's discontinuance. 8 Dowl. & Ry. 220.

defendant, instead of going down to trial again, gave the plaintiff a *cognovit*; the court of King's Bench held, that he was liable to pay the costs of the former trial. So where, after verdict for the defendant, and a new trial awarded upon a question of law, without any thing being said as to costs, the parties, instead of proceeding to a second trial, agreed to state the facts specially, as if a case had been reserved at the first, on which the *postea* was afterwards delivered to the plaintiffs, that court held, that they were entitled to the costs of the first trial.¹ In the Common Pleas, the rule is different: for there, if a new trial be granted, and the rule say nothing about costs, if the verdict on the second trial go the same way, the party succeeding is entitled to the costs of both trials; but if the verdicts go different ways, the party ultimately succeeding is not entitled to the costs of the first trial.² So, where the jury find an *insufficient* verdict, upon which the court can give no judgment, and a new trial is granted, the party ultimately succeeding is not entitled, in the [*948] Common Pleas, "to the costs of the former trial." If the plaintiff obtain a verdict for a total loss on a policy, which he endeavours to support on a rule *nisi* for a nonsuit, and the court are of opinion that he is not entitled to recover as for a total loss, but only to a return of *premium*, the plaintiff is not entitled, in the Common Pleas, to the costs of the rule; nor to any costs, except those of the count for money had and received, and such parts of the briefs and evidence as are applicable thereto.* In the Exchequer, if a cause come on for trial and be referred, and the arbitrator's award in favor of the plaintiff be afterwards set aside, so that the cause is in consequence subsequently tried, the plaintiff, if he obtain a verdict, will be allowed the costs of the former trial.³

If the verdict or nonsuit be set aside, and a new trial granted, the rule for that purpose should be drawn up and served; and if it be on payment of costs, an appointment must be obtained to tax them, from the master or prothonotaries; and when taxed, they must be forthwith paid, or the prevailing party may move the court to discharge the rule, and for leave to sign judgment, and tax his costs.⁴ And, in the King's Bench, where a nonsuit is set aside *upon payment of costs*, such payment is made a condition precedent to setting it aside; and unless they are paid, the plaintiff cannot proceed to another trial.⁵ It has been said, that after a new trial granted, no amendment can be allowed in the record.* But the practice is otherwise; it being usual, in both courts, to permit amendments to be made after trial, where the justice of the case requires it, upon reasonable terms.⁶ And when a rule for a new

¹ 10 East, 416.

² *Shoolbred v. Nutt*, M. 23 Geo. III. K. B. *Parker v. Wells*, 1 H. Blac. 639. n. *Id.* 641. 1 East, 112. *Sertes v. Hubbard*, E. 44 Geo. III. K. B. and see 3 Brod. & Bing. 304.

³ 2 Marsh. 475. but see 3 Brod. & Bing. 304.

⁴ 3 Taunt. 406. *Routh v. Thompson*, K. B. *id.* 406, 7. *semb. contra.*

⁵ 1 Price, 310. and see 3 Brod. & Bing. 304.

⁶ 13 East, 186.

⁷ *Id.* 185.

⁸ 2 Blac. Rep. 920.

⁹ 7 Durnf. & East, 132. 9 East, 335. *Ante*, 753, 4. 795, 6. K. B. 1 New Rep. C. P. 28. 2 Bos. & Pul. 243. 3 Taunt. 81. C. P.

trial is granted, the plaintiff is not bound to proceed upon it in any limited time.^a In order to proceed to a new trial, it is not necessary that the *nisi prius* record should be re-engrossed, unless the *postea* be indorsed on it, or that any new entries should be made or paid for; but the record, in the King's Bench, must be passed again, with an alteration of the term in the second *placita*, and of the return of the *distringas* in the *jurata*, and a new notice of trial given;^b after which, another *venire* and *distringas* must be sued out and returned, and the cause *set down anew.^c In the [*949] Common Pleas, if the cause be not tried the same term, a new *placita* must be added to the record of *nisi prius*, of the term it is intended to be tried; and in that case the record must be re-sealed, and paid for again to the clerk of the treasury, and there must be a new *venire* and *habeas corpora*; but this is unnecessary, if the cause be tried the same term.^d The *jurata* should also be altered, in the return of the *habeas corpora juratorum*.

The only ground of *arresting* judgment at this day, is some matter *intrinsic*, appearing upon the face of the record, which would render it erroneous and reversible; for though it seems to have been otherwise formerly,^a yet it is now settled, that judgment cannot be arrested for *extrinsic* or foreign matter, not appearing on the face of the record, but the courts are to judge upon the record itself, that their successors may know the grounds of their judgment.^b The old course of taking advantage in arrest of judgment was thus: The party, after a general verdict, having a day in court, (for so he has, as to matters of law, though not of fact,) did assign his exceptions in arrest of judgment, by way of plea, and it was called pleading in arrest of judgment: This differed from moving in arrest of judgment, which was done by one as *amicus curiæ*, when the party was out of court.^c After judgment on *demurrer*, there can be no motion in arrest of judgment, for any exception that might have been taken on arguing the demurrer: the reason is, that the matter of law having been already settled, by the solemn determination of the court, they will not afterwards suffer any one to come as *amicus curiæ*, and tell them that the judgment which they gave on mature deliberation is wrong: but it is otherwise after judgment by default, for that is not given in so solemn a manner.^d The defendant in *audita querelâ* cannot move in arrest of judgment; but must either demur at the time of filing the writ of *audita querelâ*, or if the verdict be given against him, must bring a writ of error, or move for a new trial.^e

^a *Buckle v. Hollis*, T. 4 Geo. IV. K. B.

^b *Bingley v. Mattison*, E. 24 Geo. III. K. B.

^c Imp. K. B. 9 Ed. 449. and see R. E. 33 Geo. III. K. B. 2 Saund. 254. a. (8.) 254. b.

^d Imp. C. P. 6 Ed. 384. and see 2 Saund. 254. b.

^a 1 Salk. 77.

^b 1 Ld. Raym. 232. 1 Salk. 77. S. C. *Id.* 315. 4 Bur. 2287.

^c 1 Salk. 77, 8. 315. 6 Mod. 143.

^d 1 Str. 425. 6 Taunt. 650. 2 Marsh. 326. S. C. 6 Moore, 209. *per Richardson, J.*

^e 1 Marsh. 226.

The parties cannot move in arrest of judgment, for any thing that is aided after verdict, at common law; or amendable at common [*950] law, *or by the statutes of amendments; or cured, as matter of form, by the statutes of jeofails.^f

At common law, when any thing is omitted in the declaration, though it be matter of substance, if it be such as that, without proving it at the trial, the plaintiff could not have had a verdict, and there be a verdict for the plaintiff, such omission shall not arrest the judgment.^g This rule however is to be understood with some limitation; for on looking into the cases, it appears to be, that where the plaintiff has stated his title or ground of action defectively or inaccurately, (because, to entitle him to recover, all circumstances necessary, in form or substance, to complete the title so imperfectly stated, must be proved at the trial,) it is a fair presumption, after a verdict, that they were proved; but that where the plaintiff totally omits to state his title or cause of action, it need not be proved at the trial, and therefore there is no room for presumption.^h And hence it is a general rule, that *a verdict will aid a title defectively set out, but not a defective title*;ⁱ or, in other words, nothing is to be presumed after verdict, but what is expressly stated in the declaration, or necessarily implied from the facts which are stated.^k Thus, where the grant of a reversion was stated, which could not take effect without attornment, that, being a necessary ceremony, might be presumed to have been proved.^l But where, in an action against the *indorser* of a bill of exchange, the plaintiff did not allege a demand on and refusal by the *acceptor*, when the bill became due, or that the defendant had notice of the acceptor's refusal, this omission was held to be error, and not cured by the verdict.^m for in this case, it was not requisite for the plaintiff to prove, either the demand on the acceptor, or the notice to the defendant, because they were neither laid in the declaration, nor were they circumstances necessary to any of the facts charged. So, where a declaration in *debt* for tithes, on the statute 2 & 3 Edw. VI. c. 13. § 1, omitted to state that the tithes had been yielded and paid, and of right ought to have been paid, within *forty* years next before the passing of the act; the court held that it [*951] was defective, even after verdict, and the judgment was arrested.ⁿ It is however a rule, that the defendant cannot move in arrest of judgment, for any thing that he might have pleaded in abatement.^o And if there be a misjoinder of counts, and a verdict

^f For the cases in which defects are aided after verdict at common law, or by the statutes of *jeofails*, see 1 Saund. 228. (1.)

^g 2 Show. 233. T. Raym. 487. S. C. and see Cro. Jac. 44. Hob. 78. 1 Sid. 218. Carth. 304. 389. 1 Salk. 130. 2 Ld. Raym. 1214. 1 Wils. 1. 255. 2 Wils. 5. 4 Bur. 2020. Cowp. 825. 1 Durnf. & East, 141. 3 Durnf. & East, 147. 7 Durnf. & East, 518. 2 Bos. & Pul. 259. 267.

^h Doug. 679.

ⁱ 1 Salk. 365. 2 Ld. Raym. 1225. S. C. 2 Str. 1011. 1023. Cas. temp. Hardw. 116. S. C. 1 Bur. 301. 2 Bur. 1159. 3 Wils. 275. 4 Durnf. & East, 472.

^k Per Buller, J. 1 Durnf. & East, 145. and see 7 Durnf. & East, 521. 1 Saund. 228. (1.)

^l Doug. 683.

^m Id. 679.

ⁿ 4 Barn. & Ald. 655.

^o 2 Blac. Rep. 1120.

for the plaintiff on the counts well joined, and for the defendant on the others, the misjoinder is not a cause for arresting the judgment.² So, when there is a misjoinder of counts, one of them being partly in *case* and partly in *trespass*, and another entirely in *trespass*, and no evidence was given as to the acts of trespass, the verdict, if taken generally, may be amended, according to the evidence, by the judge's notes.³

Another rule at common law is, that *surplusage* will not vitiate, after verdict; *utile per inutile non vitiatur*:⁴ and therefore, in *trover*, if the plaintiff declare that on the *third of March* he was possessed of goods, which came to the defendant's hands, and that afterwards, to wit, on the *first of March*, he converted them to his own use, this is cured after verdict; for "that he *afterwards* converted them" is sufficient, and the *scilicet* is void.⁵

As the plaintiff's action must have all the essentials necessary to maintain it, so the defendant's bar must be substantially good; and if the gist of the bar be bad, it cannot be cured by a verdict found for the defendant: but if it be found for the plaintiff, he shall have judgment, either for the badness or falsity of the bar.⁶ Thus, before the statute for the amendment of the law,⁷ if the defendant had pleaded payment without an acquittance, and it had been found for him, yet he could not have had judgment, because the gist of the plea was bad; since the obligation remained in force, until dissolved *eodem ligamine quo ligatur*: but if it had been found for the plaintiff, he should have had judgment.⁸

When a plea confesses the action, and does not sufficiently avoid it, judgment shall be given on the confession, without regard to a verdict for the defendant, which is called a judgment *non obstante veredicto*;⁹ and in such case, a writ of inquiry shall issue. The right method, in cases of this nature, is not to stay the entry of judgment upon the "verdict by rule; but to enter the verdict [⁹⁵²] upon record, and then the judgment for the plaintiff *non obstante veredicto*.¹⁰ But where, in an action for a libel, the defendant pleaded the general issue, and *eight* special pleas of justification; and the jury, at the trial, found a verdict for the plaintiff on the general issue, and two of the special pleas, without assessing damages, and for the defendant on the other pleas; and the court, on motion to enter up judgment for the plaintiff *non obstante veredicto*, decided that the latter pleas were ill, and awarded a writ of inquiry to assess the damages, and final judgment was entered thereon, in the King's Bench;¹¹ the court of Exchequer chamber, we have

² 2 Maule & Sel. 533.

³ 1 Chit. Rep. 625. (a).

⁴ Co. Lit. 303. b. Plowd. 232. 1 Saund. 169. 287.

⁵ Cro. Jac. 428.

⁶ Gilb. C. P. 140. 2 Saund. 319. c.

⁷ 4 Ann. c. 16.

⁸ 5 Co. 43. Cro. Eliz. 455. Moor, 692.

8. C. Cro. Eliz. 778.

⁹ Cro. Eliz. 214. Carth. 370. 1 Salk. 173.

8. C. 6 Mod. 1. 2 Ld. Raym. 924. 8. C.

1 Str. 394. 2 Str. 873. Barnes, 255. Com.

Rep. 548. 8. C. Willes, 364. Barnes, 266.

8. C. 1 Bur. 301. Cowp. 510. Doug. 749.

2 New Rep. C. P. 225. (a). 4 Taunt. 821.

6 Taunt. 305. 1 Marsh. 614. 8. C. 1 Moore,

199. 8 Taunt. 413. 2 Moore, 464. 8. C. 3

Moore, 610. 1 Brod. & Bing. 280. 8. C. 4

Barn. & Ald. 560. 3 Dowl. & Byl. 27. 2

Barn. & Cres. 302.

¹⁰ Willes, 364. Barnes, 266. 8. C.

¹¹ 3 Barn. & Ald. 702.

seen,^b on a writ of error, reversed the judgment as to the award of the writ of inquiry, and final judgment thereon, and remitted the record to the court of King's Bench, and directed that court to award a *venire de novo*, to try the general issue, and issue joined on the two special pleas, on which the finding was for the plaintiff; holding the verdict on those issues to be void, because no damages had been assessed.^c

A verdict cannot help an *immaterial* issue; but an *informal* one is aided by the 32 Hen. VIII. c. 30.^d An immaterial issue is, when that which is materially alleged by the pleadings is not traversed, but an issue taken on such a point as will not determine the merits of the cause: An informal issue is, where such allegation is not traversed in a proper manner.^e When the issue is immaterial, the courts will award a *repleader*; respecting which, the following rules were laid down by the court, in the case of *Staple and Haydon*.^f First, that at common law, a repleader was allowed before trial, because a verdict did not cure an immaterial issue; but now a repleader ought never to be allowed till trial, because the fault of the issue may be helped after verdict, by the statute of jeofails. Secondly, that if a repleader be denied where it should be granted, or granted where it should be denied, it is error. Thirdly, that the judgment of repleader is general, namely, *quod partes replacent*; and the parties must begin again at the first fault, which occasioned the immaterial issue.^g Thus, if the declaration be ill, and the bar and replication are also ill, the parties must begin *de novo*: but if the bar be good, and the replication ill, at the replication.^h Fourthly, [*959] no *costs* *are allowed on either side.ⁱ Fifthly, that a repleader cannot be awarded after a default at *nisi prius*. To which may be added, that a repleader can never be awarded after a demurrer, or writ of error, but only after issue joined;^k nor where the court can give judgment on the whole record:^l and it is not grantable in favour of the person who made the first fault in pleading.^m

The distinction between a repleader, and a judgment *non obstante veredicto*, seems to be this: that where the plea is good in form, though not in fact, or, in other words: if it contain a defective title, or ground of defence, by which it is apparent to the court, upon the defendant's own shewing, that in any way of putting it, he can have no merits, and the issue joined thereon be found for him, there, as the awarding of a repleader could not mend the case, the court, for the sake of the plaintiff, will at once give judgment *non obstante veredicto*,ⁿ but where the defect is not so much in the title, as in

^b *Ante*, 622.

^c 3 Brod. & Bing. 297.

^d Gilb. C. P. 147.

^e Cro. Eliz. 227. Carth. 371. 1 Lev. 33. 2 Mod. 137.

^f 2 Salk. 579. and see 6 Mod. 1. 2 Ld. Raym. 922. 3 Salk. 121. S. C.

^g 1 Ld. Raym. 169.

^h 3 Keb. 664.

ⁱ 2 Vent. 196. 6 Durrif. & East, 131.

Barnes, 125. 2 Bos. & Pul. 376.

^k 3 Salk. 306.

^l Willes, 532, 3.

^m 1 Ld. Raym. 170. Doug. 396. 747. and see 2 Saund. 319. b.

ⁿ 1 Salk. 173. 6 Mod. 1. 2 Ld. Raym. 924. S. C. 1 Str. 394. 2 Str. 873. Willes, 364. 1 Bur. 301. Cowp. 510. Doug. 749. and see the other cases referred to *Ante*, 951. (y.)

the manner of stating it, and the issue joined thereon is immaterial, so that the court know not for whom to give judgment, whether for the plaintiff or defendant, there, for their own sake, they will award a repleader.* A judgment therefore *non obstante veredicto* is always upon the merits, and never granted but in a very clear case;† a repleader is upon the form and manner of pleading.‡

A *venire facias de novo* is grantable in the following cases: First, when the jury are improperly chosen, or there is any irregularity in returning them.§ Secondly, when they have improperly conducted themselves.¶ Thirdly, when they give *general* damages, on a declaration consisting of several counts, and it afterwards appears that one or more of them is defective.‡ Fourthly, when the verdict, whether general or special,* is imperfect, by reason [*954] of some uncertainty or ambiguity,† or by finding less than the whole matter put in issue,† or by not assessing damages.* Fifthly, by the statute 7 & 8 W. III. c. 32. § 1. if the plaintiff, after issuing jury process, do not proceed to trial at the first assizes: but if the jury be discharged at the assizes, in order to have a view, there is no need of a *venire de novo*.* A *venire de novo* may be granted by a court of error;‡ or after a demurrer to evidence,§ or bill of exceptions.¶ But there is no instance of a court of error granting a *venire de novo*, when the proceedings originated in an inferior court.¶ And when a *venire de novo* is awarded, the party succeeding is only entitled to the costs of the second trial.†

The doctrine of *amendments* having been already considered, I shall next proceed to take a short review of the statutes of *jeofails*,

* 3 Salk. 305. 1 Ld. Raym. 391. S. C. 2 Str. 847. 994. 1 Bur. 301. 5 Taunt. 386. 1 Marsh. 95. S. C.

† *Raikes v. Townsend and another*, M. 45 Geo. III. K. B. 2 Smith R. 9. S. C. 3 Taunt. 237.

‡ See further, as to *repleaders*, Chitty on Pleading, 1 V. p. 632, &c.

¶ For the difference between a *venire de novo* and a new trial, see 1 Wils. 55.

* 2 Durnf. & East, 126. *in notis*.

† *Id. ibid.*

‡ R. M. 1654. § 21. K. B. R. M. 1654. § 24. C. P. Barnes, 478. Doug. 377, 8. and see 1 Durnf. & East, 542. 6 Durnf. & East, 691. 2 Saund. 171. *b. Ante*, 925. But the courts will not arrest the judgment in an action for words in one count, though some of them be not actionable; *scilicet*, where there are two counts, and none of the words in one are actionable, and there is a general verdict for the plaintiff. Willes, 443. and see 2 Saund. 171. *d.*

§ 2 Ld. Raym. 1521. 1584. 2 Str. 887. S. C. *Id.* 1124. S. P.

† Same cases; 5 Bur. 2669. 7 Durnf. & East, 52. 1 East, 111. But it seems that if the plaintiff state a defective case upon a special verdict, he is never entitled to a new trial, by a *venire de novo*. 3 Smith R. 39.

* 2 Str. 1052. 2 Wils. 367. 377. 2 Durnf. & East, 126. *in notis*. 2 Saund. 210. *g.* (3.)

† Com. Rep. 248.

‡ 2 Str. 1051. 1124. Cowp. 89. 91. Doug. 730. 1 Durnf. & East, 783. 5 Durnf. & East, 367. 2 H. Blac. 211. 2 New Rep. C. P. 328. 9. 3 Barn. & Ald. 642. but see 2 Str. 1055. 1 Durnf. & East, 151. *semb. contra*.

§ Sty. Rep. 34. 335. 5 Durnf. & East, 367. 2 H. Blac. 211.

¶ *Davies v. Lewis*, T. 27 Geo. III. K. B. 2 Durnf. & East, 125. 3 Durnf. & East, 36. 2 New Rep. C. P. 328, 9.

* 1 Durnf. & East, 153. 3 Barn. & Ald. 610. S. C. cited, but see 2 Durnf. & East, 125. *contra*.

† 6 Durnf. & East, 131. 1 East, 111. *Ante*, 931. 947, 8.

† Or, when issues being taken on several pleas, a verdict is found on one only. 6 Dougl. & Ryd. 68.

and the decisions thereon, as applicable to different proceedings in the course of the suit. And first, of the *original writ*.

The want of an *original writ*, we have seen,^s is aided after verdict, by the 18 Eliz. c. 14: which statute has been extended, by an equitable construction, to the want of a bill upon the file.^t This statute also cures the want of form, touching false *Latin*, or variance from the register, or other defaults in form, in any writ original or judicial, &c. By the 21 Jac. I. c. 13. "judgment after verdict shall not be stayed or reversed, by reason of any variance, in form only, between the original writ or bill, and the declaration, plaint or demand." And by the 16 & 17 Car. II. c. 8. (which *Twisden* Justice used to call the *omnipotent act*),ⁱ "judgment after verdict shall not be stayed or reversed, for want of form, or pledges returned upon the original writ, or because the sheriff's name is not [*955] returned thereon, or for want of pledges upon any bill or declaration, &c." Lastly, by the 5 Geo. I. c. 13. (lord *King's act*),^k "judgment after verdict shall not be stayed or reversed, for any defect or fault, either in form or substance, in any bill, writ original or judicial, or for any variance in such writs, from the declaration or other proceedings."^l

Secondly, the want of a *warrant* of attorney for either party, or a misnomer therein,^m is aided after verdict, by the 32 Hen. VIII. c. 30. and 18 Eliz. c. 14. And, by the 21 Jac. I. c. 13. "judgment shall not be stayed or reversed, for that the *plaintiff* in ejectment, or other personal action, being under age, appeared by attorney." But if the *defendant*, being under age, appear by attorney, it is still error:ⁿ Though, if an attorney undertake to appear for an infant defendant, the courts will oblige him to do it in a proper manner.^o

Thirdly, mistakes and omissions in the *declaration*, and other subsequent *pleadings*, are oftentimes cured by the statutes of jeofails; which declare, that "judgment, after verdict, shall not be stayed or reversed, by reason of any mispleading, lack of colour, insufficient pleading or *jeofail*, or other default or negligence of the parties, their counsellors or attorneys;^p want of form in any count, declaration, plaint, bill, suit or demand;^q lack of averment of any life, so as the person be proved to be alive;^r want of any *profert*, or the omission of *vi et armis* or *contra pacem*, mistaking the christian name or surname of either party;^s sums, day, month or year, in any bill, declaration or pleading, being right in any writ, plaint, roll or record preceding, or in the same roll or record wherein the same is committed, to which the *plaintiff*" (or, more properly, the *defendant*) "might have demurred, and shewn the same for cause; want of the averment of *hoc paratus est verificare*, or *hoc paratus est verificare per recordum*, or for not alleging *prout patet per recordum*, or the want of a right venue, so as the cause

^s *Ante*, 123, 4. and see 1 Saund. 318. (2).

^t Hob. 130. 134. 264. 281.

ⁱ 1 Vent. 100. and see 7 Durnf. & East, 587.

^k 3 Atk. 601.

^l 1 Saund. 317. a. (1).

^m 3 Brod. & Bing. 65. 6 Moore, 135.

^o Price, 432. S. C.

^p *Ante*, 113. Barnes, 413.

^q 1 Str. 114. 445.

^r 32 Hen. VIII. c. 30.

^s 18 Eliz. c. 14.

^t 21 Jac. I. c. 13.

^u 3 Wils. 40.

were tried by a jury of the proper county where the action is laid; or any other matters of like nature, not being against the right of the matter of the suit, nor whereby the issue or trial is altered.”^a

Fourthly, the misjoining of the *issue* is aided by the 32 Hen. VIII. c. 30. which also extends to any miscontinuance or discontinuance, or *misconveying of process: And a discontinuance is cured [*956] by the appearance of the party, in *penal* as well as other actions.^a But the want of a *similiter* was formerly holden not to be aided or amendable:^b and where, in the *similiter*, the defendant's name was put instead of the plaintiff's, the chief justice dismissed the jury, conceiving that he had no commission to try the issue.^c But, in a subsequent case, where a similar mistake was made, the court, after trial of the issue, refused to arrest the judgment:^d and at length, the want of a *similiter* was holden to be amendable, upon three grounds; first, that it was merely an omission of the clerk; secondly, that it was implied in the &c. added to the last pleading; and thirdly, that by amending, the court only made that right, which the defendant himself understood to be so, by his going down to trial.^e So where, to a rejoinder concluding with a verification, the plaintiff, instead of taking issue and concluding to the country, added the *similiter*, and took down the record to trial, and the defendant obtained a verdict, the court would not grant a new trial, but amended the record:^f So, where the parties had gone down to trial, upon a plea which had not been traversed, the plaintiff, after a verdict in his favour upon the merits, was permitted to amend, by adding a traverse; and the defendant's motion in arrest of judgment was discharged, upon payment of costs by the plaintiff of both motions.^g And, in the King's Bench, a record may be amended, even in a penal action, after verdict for the plaintiff, by inserting a *similiter*, though the objection was taken at the trial.^h But, in the Common Pleas, where the defendant pleaded *six* several pleas, and the plaintiff did not reply to the last, but left it wholly unnoticed in the record, which he was aware of before trial, and a verdict was found for the plaintiff with nominal damages, subject to the award of an arbitrator, who found for the plaintiff on the first and second issues, and for the defendant on the third, fourth, and fifth, without prejudice to the objection on the record; the court held, that the plaintiff could not amend, by adding a traverse and *similiter* to the sixth plea; and that the defendant was not entitled to arrest the judgment, but might bring a writ of error:ⁱ And, in a late case, the omission of a *similiter* was holden to be an irregularity, for which the court set aside the verdict.^j

^a 16 & 17 Car. II. c. 8.

^b 6 Durnf. & East, 255.

^c 1 Str. 641. 8 Mod. 376. S. C.

^d 2 Str. 1117.

^e 3 Bur. 1793.

^f Cowp. 407. and see 1 Str. 551, 2 Saund. 319. (6.) 1 Stark, *Ni. Pri.* 400.†

^g 1 New. Rep. C. P. 28.

^h 5 Taunt. 164.

ⁱ 2 Chit. Rep. 25. 1 Stark. *Ni. Pri.* 400.

S. C.

^j 2 Moore, 215.

^k 3 Brod. & Bing. 1. 6 Moore, 57. S. C.

† 2 Bingh. 384. C. B. *accord.* and see this case.

[*957] Fifthly, with respect to the *jury* process, it is provided by the statute 21 Jac. I. c. 13. that "after verdict, judgment shall not be stayed or reversed, by reason that the *venire facias*, *habeas corpora* or *distringas*, is awarded to a wrong officer, upon any insufficient suggestion; or by reason the *visne* is in some part mis-awarded, or sued out of more places, or of fewer places, than it ought to be, so as some one place be right named; or by reason that any of the jury which tried the said issue is mis-named, either in the surname or addition, in any of the said writs, or in any return upon any of the said writs, so as upon examination it be proved to be the same man that was meant to be returned; or by reason that there is no return upon any of the said writs, so as a panel of the names of the jurors be returned and annexed to the said writ; or for that the sheriff's name, or other officer's name, having the return thereof, is not set to the return of any such writ, so as upon examination it be proved that the said writ was returned by the sheriff or under-sheriff, or any such other officer." And, by the statute 16 & 17 Car. II. c. 8. the want of a right venue is cured after verdict, so as the cause be tried by a jury of the proper county, where the action is laid. The last of these statutes seems to extend, not only to cases where there is a wrong venue in a right county, but also to those where the cause has been improperly tried in a wrong county.⁵ But where, in *ejectment* for lands in *Cardiganshire*, the *venue* was awarded out of *Shropshire*, upon a suggestion of its being the next *English* county, the court, after verdict for the plaintiff, arrested the judgment on the ground of a mis-trial,[†] *Herefordshire* being the next adjoining *English* county to *South Wales*; although it appeared, that *Shropshire* was in fact nearer to the lands in question, and the cause might have been more conveniently tried there than in *Herefordshire*.^h

If a *venire* be of the same action, and between the same parties, all other faults are amendable.ⁱ But these are incurable: and therefore, in *ejectment*, if the *venire* be of a *plea of trespass*, omitting *and ejectment of farm*, it is ill, because not in the same action; but if the *distringas* had been right, the court would have adjudged the *venire* to be null, and the want of it is aided.^k So, in *scire facias* against an executor, to have execution of a judgment for damages in *trover*, it was moved in arrest of judgment, that the [*958] *venire* was in a **plea of debt*, and a new *venire* was awarded.^l The statute 21 Jac. I. only extends to the *surnames* and additions of the jurors; and therefore, if there be a mistake in the *christian* name, it is incurable.^m But the court of Common Pleas refused to

⁵ 7 Durnf. & East, 583. and see 1 Ld. Raym. 330. Carth. 448. S. C. Willes, 431. 2 East, 580. 1 Saund. 248. (3.) 2 Saund. 5. (3.)

^h 2 Maule & Sel. 270.

ⁱ Gilb. C. P. 174.

^k *Id.* 175. Bul. N. Pri. 320. but see Cro. Car. 275. 278. where a similar mistake in the *jurata* was amended, the *venire* and *distringas* being right.

^l Cro. Jac. 528. Bul. N. Pri. 320.

^m 5 Co. 42. Cro. Car. 202. Gilb. C. P. 177.

[†] See on the subject of mis-trial, 7 Dowd. & Ryd. 684.

set aside a verdict, and grant a new trial, because one of the jurors was named *Henry* in the *venire*, *habeas corpora*, and *postea*, his real christian name being *Harry*.^a And in a late case, where the son of a juryman summoned and returned, had answered to his father's name, when called on the panel, and served, without objection, as one of the jury on the trial of the cause; the court of King's Bench, after consulting with the other judges, held that this was not of itself a sufficient ground for setting aside the verdict, as for a mis-trial:^b But where a person not summoned to serve on a jury, answered to the name of a person who was, and served in his room, the objection having been made before the verdict was taken, the court of Common Pleas awarded a *venire de novo*.^c It is necessary however, by the above statute, that there should be a panel returned: therefore, if the sheriff return but twenty-three on the *venire*, and twenty-four on the *distringas* or *habeas corpora*, and the twenty-fourth, omitted on the *venire*, appear and be sworn, the verdict will be void:^d But if twelve of the twenty-three be sworn, and not the twenty-fourth, it is aided by the 18 Eliz. So, where there were but twenty-four returned upon the panel annexed to the *venire facias*, and there were forty-eight on the *habeas corpora*, upon which the defendant made no defence, the court of Common Pleas, upon motion, set aside the verdict without costs; saying, that the 21 Jac. I. means only the formal words upon the writ, for there must be a panel annexed to the return.^e Where, in a *distringas*, the day of *nisi prius* is made subsequent to the day in bank, it is not amendable.^f

The statutes of jeofails are extended, by the statute for the amendment of the law,^g to judgments entered upon confession, *nihil dicit*, or *non sum informatus*,^h in any court of record; and it is thereby enacted, that "no such judgment shall be reversed, nor any judgment upon any writ of inquiry of damages executed thereon be stayed or reversed, for or by reason of any imperfection, omission, defect, matter or thing whatsoever, which would have been aided and cured by any of the said statutes of *jeofails*, in case a [959] verdict of twelve men had been given in the said action or suit, so as there be an original writ or bill, and warrants of attorney duly filed according to law:" And, by a subsequent act,ⁱ this and all the statutes of jeofails are extended to writs of *mandamus*, and informations in nature of a *quo warranto*. But pleadings on writs of *extent*, are not considered as proceedings for the recovery of the king's debts, within the meaning of the statute 4 Ann. c. 16. § 24.^j A motion in arrest of judgment, after judgment by default, is to be considered exactly the same as if the question had arisen on a general demurrer:^k and on demurrer, we may remember, that by the

^a Willes, 488. Barnes, 454. S. C. but see Willes, 492, 3.

^b 12 East, 229. Willes, 484. Barnes, 453. S. C. *contra*.

^c 6 Taunt. 460. 2 Marsh. 154. S. C.

^d Cro. Car. 278. Gilb. C. P. 173.

^e *Brown & Johnson*, T. 11 Geo. II. C. P. Bul. N. Pri. 324.

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^f 1 Salk. 48, 51. *Ante*, 767. 769.

^g 4 Ann. c. 16. § 2.

^h But this statute does not seem to apply to judgments on *multiel record*.

ⁱ 9 Ann. c. 20. § 7.

^j 5 Price, 621.

^k 2 Bur. 899.

statute 4 Ann. c. 16. the court are required to give judgment according to the very right of the cause, without regarding any such imperfections, omissions and defects, as are particularly mentioned in the act, or any other matter of like nature, except the same shall be specially set down and shewn for cause of demurrer, notwithstanding the same might have heretofore been taken to be matter of substance, and not aided by the statute of Queen *Elizabeth*, so as sufficient matter appear in the pleadings, upon which the court may give judgment, according to the very right of the cause.^a As there cannot however be the same intendment, in support of a judgment by default, as after a verdict, it has been holden, that the statutes of jeofails do not protect judgments by default, against objections that are cured by a verdict at common law, but such only as are remedied after a verdict by the statutes.^b

The statute 32 Hen. VIII. c. 30. is confined to actions at common law; and, in all the subsequent statutes of jeofails, there is a *proviso*, that they shall not extend to *criminal* proceedings; nor to any writ, bill, action, or information upon any *popular* or *penal* statute, other than such as concern the customs, and subsidies of tonnage and poundage.^c It has however been determined, that the statute 32 Hen. VIII. c. 30. extends to *penal* actions.^d And, by the statute 4 Geo. II. c. 26. which reduces the forms of legal proceedings into the *English* language, "all and every statute and statutes for the reformation and amending of the delays arising from any *jeofails*, shall and may extend to all and every form and forms, and to all proceedings in courts of justice, (except in *criminal* cases,) when [*960] the forms and *proceeding are in *English*; and all errors and mistakes are amendable and remedied thereby, in like manner as if the proceedings had been in *Latin*." And though, by the 16 & 17 Car. II. c. 8. the several omissions, variances and defects therein mentioned, are required to be *amended* by the judges of the court where the judgment is given, or the record removed by writ of error, yet an actual amendment is never made on this statute; but the benefit of the act is attained by the court's overlooking the exception.^e

The motion in arrest of judgment, or for judgment *non obstante veredicto*, &c. may be made, in the King's Bench, at any time before judgment is given;^f though a new trial has been previously moved for.^g But it is against the ancient course of the court, to make a rule to stay judgment, unless the *postea* be brought in: and therefore it is said, that if one move in arrest of judgment, he ought to give notice to the clerk in court on the other side; but the better way is to give a rule upon the *postea*, for bringing it into court, and that is notice of itself.^h

^a *Ante*, 751, 2. and see 10 East, 359.

^b 2 Str. 933. and see 1 Saund. 228. (1.) 13 East, 407.

^c 16 & 17 Car. II. c. 8. and see 1 Wils. 127. Cowp. 392.

^d 3 Lev. 375. 1 Str. 136. 2 Str. 1227. Doug. 115. *Ante*, 769.

^e 2 Str. 1011. *Cas. temp. Hardw.* 314, 15.

^f 2 Str. 845. *Rex v. Keene & others*, H.

26 Geo. III. K. B. 5 Durnf. & East, 445. And for the form of the rule, see Append.

Chap. XXXVIII. § 3.

^g Doug. 745, 6.

^h 1 Salk. 78. 6 Mod. 24. S. C. and see 5 Durnf. & East, 454, 5. 8 East, 28. K.

B. 2 Wils. 380. C. P.

In the Common Pleas, the motion in arrest of judgment must be made before or on the appearance day of the return of the *habeas corpora juratorum*,¹ and it cannot be made, without notice, on the last day of term.² On moving in arrest of judgment after verdict, the roll should be brought into court, if it be entered on record; if not, the record of *nisi prius* should be produced by the associate.³ And, if the record be right, a motion in arrest of judgment cannot be founded on an apparent error in the copy of the declaration delivered to the defendant.⁴ If the motion be made on an inquisition, and the same be not taken from the sheriff, he should have notice to produce it in court, in order to move for the rule; or if the plaintiff's attorney has it, notice should be given him to produce it: and in either case, an affidavit should be made of the service of notice.⁵ The rule, if granted, is drawn up by the secondaries; and stays the entry of final judgment upon the verdict or inquisition, until the court be moved on behalf of the plaintiff, and shall otherwise order:⁶ and if the plaintiff mean to discharge the rule, notice of motion must be given to the defendant's attorney,⁷ and an affidavit made [*961] of the service of such notice.⁸ If judgment be arrested, a rule is drawn up by the defendant's attorney, and a copy of it served on the plaintiff's; or if the rule for arresting the judgment be discharged, the plaintiff's attorney draws up the rule for discharging it, and proceeds in the usual way, to tax his costs on the *postea* or inquisition.⁹ In the Exchequer, the motion in arrest of judgment must, it seems, be made within the first four days of the next term after the trial; and it cannot be made after an unsuccessful motion for a new trial.[†]

¹ Barnes, 445.

² *Id.* 247. Cas. Pr. C. P. 105. S. C.

³ Imp. C. P. 430.

⁴ 8 Taunt. 335.

⁵ Imp. C. P. 430, 31.

⁶ Append. Chap. XXXVIII. § 4.

⁷ Append. Chap. XXXVIII. § 5.

⁸ Imp. C. P. 430.

⁹ 7 Price, 566. but see Man. Ex. Pr. 353.

[†] *Vide ante*, p. 944, and note (†), as to moving for a new trial after motion in arrest of judgment.

CHAP. XXXIX.

OF JUDGMENTS.

ON the expiration of the rule for judgment in the King's Bench, or time limited for that purpose in the Common Pleas,^a if there be no previous motion for a new trial, or in arrest of judgment, &c. the prevailing party may proceed to tax his costs, and sign final judgment. And, in *ejectment*, when a plaintiff has been nonsuited at the trial, on account of the defendant's not having confessed lease entry and ouster, judgment may be regularly signed on the *first* day of the ensuing term, and a writ of possession issued on the same day, although the *postea* be not delivered over at the time, by the associate, to the attorney for the plaintiff.^b Costs are taxed by the master in the King's Bench, or prothonotaries in the Common Pleas, as will be more fully shewn in the next Chapter: and final judgment is signed by the master or prothonotaries,^c on a sheet of paper, stamped with a *ten* shilling stamp,^d called a final judgment paper, containing an *incipitur* of the pleadings. Taxing costs and signing final judgment are considered, in the King's Bench, as contemporaneous acts: and therefore the attendance of the defendant's attorney before the master, on taxing costs, is held to be an admission that the judgment was properly signed; and it cannot afterwards be objected to, as having been signed too soon.^e

Judgment is the conclusion of law, upon facts found or admitted by the parties, or upon their default, in the course of the suit. And, except when the court are equally divided in opinion, it is either for the plaintiff, or defendant: for the former, by *confession*,^f *non sum informatus*,^g or *nihil dicit*;^h for the latter, on a *non pros*,ⁱ [⁹⁶³] discontinuance,^k *nolle prosequi*,^l *cassetur processus*, *cassetur billa vel breve*,^m *retraxit*, nonsuit,ⁿ or as in case of a nonsuit;^o and for either party, upon demurrer,^p *nul tiel record*,^q or verdict.^r

^a *Ante*, 934, 5.

^b 1 Barn. & Cres. 118. 2 Dowl. & Ryl. 229. S. C.

^c R. M. 6 Geo. II. reg. 4. C. P. and see R. T. 29 Car. II. reg. 5. C. P.

^d Stat. 48 Geo. III. c. 149. *Sched.* Part II. § III. 55 Geo. III. c. 184. *Sched.* Part II. § III.

^e *Per Cur.* E. 45 Geo. III. K. B. and see 5 Taunt. 672. 1 Marsh. 278. S. C. 1 Bing. 233. C. P.

^f *Append.* Chap. XXIII. § 5, &c.

^g *Id.* § 25, &c.

^h *Id.* § 32, &c. 68, &c. 84, 5.

ⁱ *Id.* Chap. XVII. § 22, &c. Chap.

XXIX. § 4, 5. Chap. XXXI. § 39, 40.

^j *Append.* Chap. XXIX. § 8, 9.

^k *Id.* § 10, 11, 12.

^l *Id.* Chap. XXVII. § 4.

^m *Id.* Chap. XXXIX. § 23, &c.

ⁿ *Id.* Chap. XXXIV. § 17.

^o *Id.* Chap. XXXII. § 2, &c.

^p *Id.* Chap. XXXIII. § 9, &c.

^q *Id.* Chap. XXXIX. § 1, &c.

When the court are equally divided in opinion, no judgment can regularly be entered:¹ but in a late case,² where that occurred, one of the judges declined giving his judgment, in order to give the plaintiff an opportunity, if he should be so disposed, to carry the matter further; it being understood, that if he should not be disposed to do so, no judgment was to be entered. The present chapter will be principally confined to the judgment on an issue in *fact* found by verdict; the other species of judgments having been already treated of.

In *assumpsit*, *covenant*, *case*, *replevin*,³ and *trespass*, the judgment for the plaintiff is, that he recover his damages and costs against the defendant; to be levied, when the plaintiff is entitled to costs in an action against an executor or administrator, of the goods of the testator or intestate, in the hands of the defendant, if he hath so much thereof in his hands to be administered; and if not, then the costs to be levied *de bonis propriis*.⁴ In *debt*, the judgment for the plaintiff is, that he recover his debt, together with his damages and costs: to be levied, when the plaintiff is entitled to costs in an action against an executor or administrator, of the goods of the testator or intestate, if, &c. and if not, then the damages and costs to be levied *de bonis propriis*.⁵ In *annuity*, the judgment is for the plaintiff to recover the annuity, and arrearages of the same, as well before the bringing of the action as afterwards, up to the time when judgment is given.⁶ In *detinue*, it is for the plaintiff to recover the goods, or their value, with damages and costs.⁷ In *replevin*, the judgment for the defendant, at common law, is to have a return of the goods;⁸ or, upon the statute 17 Car. II. c. 7, to recover the arrearages of rent, or value of the goods, and costs;⁹ and in other actions, the judgment for the defendant upon a *non pros*, nonsuit or verdict, is to recover his costs only.⁴

*After final judgment signed, execution may be immedi- [*964] ately taken out against the defendant's person or goods; but in order to charge him in execution, or bind his lands, or to proceed against him by action of *debt* or *scire facias* on the judgment, or against his bail on their recognizance, or if a writ of error be brought, it is necessary that the judgment should be *entered* of record and docketed, and the judgment roll carried to and filed in the treasury of the court. The judgment book produced by the officer of the court, is not evidence of the judgment entered therein, though the record has not been made up, and though the person interested in proving the judgment be no party to the action:¹⁰ and it seems, that any person who is interested in a judgment, may compel the plaintiff to enter it up.¹¹

¹ 1 Salk. 17. 1 Str. 37. 1 Campb. 468.

² *Deane v. Clayton*, 7 Taunt. 489. 1 Moore, 203. S. C.

³ Append. Chap. XLV. § 45.

⁴ 4 Durnf. & East, 648. 7 Durnf. & East, 359. Append. Chap. XXIII. § 9. 44. Chap. XXXIX. § 12.

⁵ Append. Chap. XXIII. § 20. Chap. XXXIX. § 15.

⁶ Co. Ent. 50. Cro. Car. 436.

⁷ Append. Chap. XXIII. § 85. Chap. XXXIX. § 18.

⁸ *Id.* Chap. XLV. § 40. 54, 5. 69, 70.

⁹ *Id.* § 41. 56. 72.

¹⁰ *Id.* Chap. XVII. § 22, &c.

¹¹ 2 New Rep. C. P. 474. *Ante*, 603.

¹² *Id.* *ibid.*

The judgment after verdict, &c. is entered on the *issue* roll,⁸ which from thenceforth is called the *judgment* roll; and in the King's Bench, if the roll has been already carried in, which seldom happens but where the plaintiff has been ruled to enter the issue, the *postea* is taken, with the master's *allocatur*, to the treasury at *Westminster*, and the clerk of the treasury continues the proceedings, and enters the judgment. But if, as is more frequently the case, an *incipitur* only is made on the issue roll, at the time of passing the record of *nisi prius*, the whole proceedings are to be entered, beginning with the warrants of attorney.⁹ The proceedings in this court are continued on the issue roll, after the award of the *venire facias*, by the following entry: *Afterwards, the process thereof is continued between the parties aforesaid, of the plea aforesaid, by the jury being respited between them, before the lord the king at Westminster, or (by original,) wheresoever, &c. until [the return of the distringas,] unless, &c. [as in the jurata,] according to the form of the statute in such case made and provided, for default of the jurors, because none of them did appear: At which day, before the said lord the king at Westminster, comes the said (plaintiff,) by his said attorney: and the said chief-justice, [or justices of assize,] before whom the said issue was tried, sent hither his [or their] record had in these words, to wit:* [then follows a copy of the *postea*, from the *nisi prius* record, and afterwards the final judgment:¹] In the Common Pleas, the entry is as follows:² *At which day, the jury between the parties aforesaid, of the plea aforesaid, was thereupon put in respite between them, until this day, to wit, [1795] [the return of the habeas corpora juratorum,] then next following, unless, &c. [as in the jurata.] And now here at this day, comes the said (plaintiff) by his attorney aforesaid; and the said chief-justice, [or justices of assize,] before whom, &c. sent hither his [or their] record, &c. [as in the King's Bench.]* And in the Common Pleas, we have seen, the *postea* is left with the clerk of the judgments, who enters it on the roll.¹ In a county palatine, an entry is made on the roll, of the record being sent, with the *postea* indorsed upon it, by the justices before whom the cause was tried, on a day prefixed to the parties to be in court, to hear judgment.²

At common law, the death of a *sole* plaintiff or defendant, before final judgment, would have abated the suit: but as the judgment relates to the first day of term, if the party be alive after that day, it may be entered, and costs taxed thereon, after his death.³ And if either party had died in vacation, after the plaintiff was entitled to enter judgment on a warrant of attorney,⁴ or on a verdict at a

⁸ *Ante*, 787. 791, 2.

⁹ *Ante*, 792.

¹ *Append. Chap. XXXIX. § 1, &c. and see 2 Saund. 254. a. (8.)*

² *Lil. Ent. 379.*

³ *Ante*, 932.

⁴ *Append. Chap. XXXIX. § 6, &c.*

⁵ 1 Kenyon, 378.

⁶ 1 *Ld. Raym.* 696. 1 *Salk.* 87. 3 *Salk.* 116. 2 *Ld. Raym.* 766. 849. 7 *Mod.* 2. 93. *S. C.* 3 *Salk.* 159. 1 *Salk.* 401. 7 *Mod.* 39. *S. C.* 3 *P. Wms.* 399. *Willes*, 427. 6 *Durnf. & East*, 368. 7 *Durnf. & East*, 20.

sitting in term,^p &c. judgment might have been entered that vacation, as of the preceding term, and it would have been a good judgment at common law as of the preceding term; though it be not so, upon the statute of frauds, in respect of purchasers, but from the *signing*. And if either party die after a special verdict, or special case, and pending the time taken for argument or advising thereon, or on a motion in arrest of judgment, or for a new trial, judgment may be entered at common law, after his death, as of the term in which the *postea* was returnable, or judgment would otherwise have been given, *nunc pro tunc*;^q that the delay arising from the act of the court, may not turn to the prejudice of the party.

So, in actions against executors or administrators, if the application be made in a reasonable time, the courts will give the plaintiff leave to enter up judgment as of a preceding term, when it was signed, *nunc pro tunc*.^r This however is discretionary in the courts; and being a matter of indulgence, they have sometimes refused to allow it, after a considerable lapse of time, where the delay has been owing to the "plaintiff or his attorney." And in granting this indul- [*966] gence, the courts will take care that it shall not operate to the prejudice of the defendant, by making the plaintiff undertake not to disturb intermediate payments made by the defendant,^s or impeach judgments obtained in the interval.^t In an action of *debt* on judgment, the court of King's Bench would not give leave to enter up the judgment *nunc pro tunc*, where the proceedings were stayed pending a writ of error, and the plaintiff died before the affirmance of the judgment.^u So, if the plaintiff die after a verdict for the defendant, and the latter do not enter up judgment within *two* terms after the verdict, pursuant to the statute 17 Car. II. c. 8. § 1. the court have no authority to permit it to be entered up afterwards, *nunc pro tunc*.^v And in general it should seem, that if there be a rule for judgment, and it be not entered for many years, the court will not suffer it to be entered, without examining how it came not to be entered before.^w

When either party dies *between verdict and judgment*, it is enacted by the statute 17 Car. II. c. 8. that "his death shall not be alleged for error, so as the judgment be entered within *two* terms after the verdict." This statute does not seem to extend to *non-suits*: And in the construction of it after *verdict*, it has been holden that the death of either party before the assizes is not remedied; but if the party die after the assizes begin, though before the trial, that is within the remedy of the statute; for the assizes are considered

^p 1 Salk. 401. 6 Mod. 191. 2 Ld. Raym. 869. Barnes, 266.

^q 1 Leon. 187. Latch, 92. 1 Sid. 462. 1 Vent. 58. 90. S. C. 10 Mod. 30. 325. 1 Str. 427. 2 Str. 917. 1 Kenyon, 253. 1 Bur. 147. 226. 4 Bur. 2277. 1 East, 409. Barnes, 255. 261. 1 Taunt. 385.

^r 6 Durnf. & East, 6. *Baker v. Baker* executrix, H. 35 Geo. III. K. B. *Lloyd v. Howell*, administratrix, H. 37 Geo. III.

K. B. and see 4 Taunt. 702.

^s 1 Str. 639. Barnes, 262. and see 6 Mod. 191.

^t 6 Durnf. & East, 11.

^u *Lloyd v. Howell* administratrix, H. 37 Geo. III. K. B.

^v 1 Durnf. & East, 637.

^w 4 Taunt. 702.

^x 6 Mod. 59.

but as one day in law, and this is a remedial act, which shall be construed favourably.^a But a verdict and judgment for the plaintiff were set aside by the court of Common Pleas, where the defendant died on the night before the trial of a cause at the sittings in term.^b So, if a verdict be taken for the plaintiff, subject to a reference, and one of the parties die before any award is made, the arbitrator, we have seen,^c cannot afterwards proceed to make an award; the death of the party operating as a revocation of his authority. The judgment upon this statute is entered by or against the party, as though he were alive;^d and it should be entered, or at least signed,^e within two terms after the verdict: but there must be a *scire facias* to revive it, before execution.^f

[*967] By a subsequent statute^g it is enacted, that "in all actions to be commenced in any court of record, if the plaintiff or defendant happen to die *after interlocutory and before final judgment*, the action shall not abate by reason thereof; if such action might have been originally prosecuted or maintained by or against the executors or administrators of the party dying; but the plaintiff, or, if he be dead after such interlocutory judgment, his executors or administrators, shall and may have a *scire facias* against the defendant, if living after such interlocutory judgment, or if he died after, then against his executors or administrators, to shew cause why damages in such action should not be assessed and recovered by him or them." And, by the same statute,^h "if there be *two or more plaintiffs or defendants*, and one or more of them die, if the cause of action survive to the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants, the writ or action shall not be thereby abated; but such death being suggested upon the record, the action shall proceed, at the suit of the surviving plaintiff or plaintiffs, against the surviving defendant or defendants."ⁱ And if the plaintiff become *bankrupt* after interlocutory judgment, his assignees may proceed to final judgment^k and execution,^l in the bankrupt's name, without a *scire facias*. So where the plaintiff, after verdict was discharged under an insolvent act, the court of King's Bench held that the assignee might make use of his name, in entering up judgment, and taking out execution.^m

The judgment, by general intendment of law, has relation to the first day of the term whereof it is entered,ⁿ unless any thing appear

^a 1 Salk. 8 and see 2 Ld. Raym. 1415. *in notis.* 7 Durnf. & East, 31.

^b 3 Bos. & Pul. 549.

^c *Ante*, 877. 892.

^d 1 Salk. 42. 401.

^e 1 Sid. 385. Barnes, 261.

^f 1 Wils. 202.

^g 8 & 9 W. III. c. 11. § 6.

^h § 7.

ⁱ Append. Chap. XXIII. § 43. Chap. XXXI. § 19. 21. &c. 48. Chap. XXXIX. § 11.

^k 2 Wils. 358. 372. 378.

^l 3 Durnf. & East, 437. But note, there was a *scire facias* after judgment to war-

rant execution, in the cases of *Bibbins* and others v. *Mantle*, 2 Wils. 372. 378. and *Winter* and others v. *Kretchman*, 2 Durnf. & East, 45. and see 1 Mod. 93. 1 Vent. 193. S. C. 5 Mod. 88. 1 Durnf. & East, 463.

^m *Abbis v. Barnard*, M. 35 Geo. III. K. B.

ⁿ Cro. Car. 102. 3 Salk. 212. 1 Wils. 39. 1 Kenyon, 378. 7 Durnf. & East, 21. 4 Moore, 430. 2 Brod. & Bing. 53. 4 S. C. In actions by *original*, the judgment seems to relate to the *essoin* day; in actions by *bill*, to the first day in full term. 2 Saund. 148. *f. Per Buller, J. in Rich-*

on the record, shewing that it cannot have that relation,* and as against the defendant and his heirs, it binds a moiety of all the *freehold* lands and tenements,² which he or any person or persons in *trust* for him,³ was or were seised of, at or after the time [*968] to which the judgment relates: And a court of equity will not oblige a judgment creditor to wait, till he is paid out of the rents; but will accelerate the payment, by directing a sale of the moiety.⁴ But *copyhold* lands are not bound by the judgment.⁵ When there is a *term* attendant on the inheritance, a judgment is a lien on the inheritance, and consequently affects the term;⁶ but generally speaking, a judgment does not bind *leasehold* property, which is affected only by the writ of execution;⁷ and as against purchasers, by the delivery of it to the sheriff.⁸

As to *freehold* lands, they are bound at common law, from the time of the judgment, so that execution may be had of these, though the party aliene *bonâ fide* before execution sued out.⁹ Therefore, if a man has judgment for a debt, and the debtor, before execution sued, aliene by fine, and *five* years pass, yet the plaintiff may still sue out execution.² But if one article to buy an estate, and pay the purchase money, and afterwards a judgment is recovered against the vendor by a third person, who had no notice, yet this judgment shall not in equity affect the estate; because from the time of the articles, and payment of the money, the vendor was only a trustee for the purchaser.⁴ In such case however it must be understood, that the consideration paid is somewhat adequate to the thing purchased; for if the money be but a small sum, in respect of the value of the land, this shall not prevail over a mesne judgment creditor:⁵ and a mortgagee for a valuable consideration, and without notice, shall take place of the intended purchaser; for in this case, the money is lent upon the title and credit of the estate, and attaches upon the land; but it is not so in the case of a judgment creditor, who (for aught that appears,) might have taken out execution against the person or goods of the party that gave the judgment; and a judgment is only a general security, not a specific lien upon the land.⁶

If A. and B. recover several judgments against C. and A. sue out an *elegit*, and have a moiety of C.'s lands delivered to him, and then B. sue out an *elegit*, the sheriff it seems can only extend a moiety of *the* remaining land.⁴ But if A. have two judg- [*969]

ards v. Hinton, E. 22 Geo. III. K. B. *Pe-
trie v. Lord Porchester*, H. E. & T. 23
Geo. III. K. B. 2 Durnf. & East, 576. 1
Sel. Pr. 8. and see 7 Durnf. & East, 20.

² 3 Bur. 1596.

³ Stat. Westm. 2. (13 Edw. I.) c. 18.
And bringing *debt* on a judgment is no
waiver of the lien created by it. 1 Salk.
80.

⁴ Stat. 29. Car. II. c. 3. § 10.

⁵ 2 Atk. 610. Amb. 17. S. C.

⁶ 1 Rol. Abr. 888. 3 Blac. Com. 419.

⁷ 2 Vern. 525.

⁸ Godb. 161. 8 Co. 171. 2 Nels. Abr.

783.

⁹ Stat. 29 Car. II. c. 3. § 16. 3 Atk.
739. and see 1 Vez. 195. Sugd. *V. & P.*
306. 310, 450, &c.

² 2 Saund. 7. (5.)

³ 1 Chan. Cas. 268. 1 Mod. 217.

⁴ 1 P. Wms. 278. 10 Mod. 468. 2 Eq.
Cas. Abr. 683.

⁵ 1 P. Wms. 282.

⁶ *Id.* 279.

⁷ Cro. Eliz. 413. 2 Bac. Abr. 350. Gilb.
Exec. 65, 6. But *qu.* whether it must
not be understood in this case, that the
elegits were sued out in different terms?

ments against C. and in the same term take out two *elegits*, on the one he may have a moiety of the whole, and on the other the other moiety, and is not restrained on the latter, to a moiety of the moiety; for in judgment of law, the whole term is but as one day.^a On lending money therefore, if the lender take two several bonds and warrants of attorney, one for a part, the other for the residue of the money, and enter up two several judgments thereon, of the same term, he may take the whole of the defendant's lands upon them.^f

By the statute 21 Jac. I. c. 19. § 9. "creditors having security by judgment, &c. whereof there is no execution or extent served and executed upon any of the lands, &c. of the bankrupt, before such time as he shall become bankrupt, shall not be relieved upon any such judgment, &c. for any more than a rateable part of their just and due debts, with the other creditors of the bankrupt." And therefore, where A. a trader, seised of lands in fee, gives a judgment to B. and then, in consideration of 5000*l.* paid down, 650*l.* to be paid at *Christmas*, articles to sell the lands to C. and let him into possession at *Michaelmas*, and afterwards becomes bankrupt, the judgment not being served and executed, and the 650*l.* remaining unpaid; B. shall only come in *pro ratâ* with the rest of the creditors: the words of the statute 21 Jac. I. c. 19. § 9. being full and plain, that all the creditors of a bankrupt, unless there is a mortgage, shall be equally paid.^g But if A. a trader confess judgment to B. and then sell and convey the land, for a valuable consideration, to C. and afterwards become bankrupt, it seems that the judgment creditor shall extend the land in the hands of C. who bought prior to the bankruptcy, this not prejudicing the other creditors.

On a judgment against A. upon his own bond, a moiety only of his freehold property can be taken in the hands of his heir.^h But if a judgment be obtained against an heir, on the obligation of his ancestor, the plaintiff was at common law entitled to execution out of the whole of the property, which he had by descent, at the time of issuing the original writ,ⁱ or filing the bill.^k And by the statute 3 W. & M. c. 14. § 5. "in all cases where any heir at law shall [*970] be liable to pay the debt of his ancestor, in regard of any lands tenements or hereditaments descending to him, and shall sell, aliene or make over the same, before any action brought or process sued out against him, such heir at law shall be answerable for such debt or debts, in an action or actions of *debt*, to the value of the said land, so by him sold, aliened or made over; in which cases all creditors shall be preferred, as in actions against executors and administrators: and such execution shall be taken out, upon any judgment or judgments so obtained against such heir, to the value of the said land, as if the same were his own proper debt or debts: saving that the lands, tenements, and hereditaments, *bonâ fide* aliened before the action brought, shall not be liable to such execu-

^a Hardr. 23.

^f Gilb. Exec. 56.

^g 1 P. Wms. 737. 739.

^h Dyer, 271. a. Carth. 107. 3 Bac. Abr.

25.

ⁱ Plowd. 441. Co. Lit. 102. a. b. 3 Co. 12. a. 2 Atk. 609, 10. Amb. 16, 17. S. C.

^k Carth. 245. and see 2 Saund. 7. (4.)

tion." A bond therefore, is in some cases a preferable security to a judgment.

And, for more effectually securing the payment of the debts of *traders*, it is enacted by the statute 47 Geo. III. sess. 2. c. 74. that when any person, being at the time of his death a trader within the true intent and meaning of the laws relating to bankrupts, shall die seised of or entitled to any estate or interest in lands, tenements, hereditaments, or other real estate, which he shall not by his last will have charged with, or devised subject to or for the payment of his debts, and which before the passing of this act would have been assets for the payment of his debts due on any specialty in which the heirs were bound, the same shall be assets, to be administered in courts of equity, for the payment of all the just debts of such person, as well debts due on simple contract as on specialty; and that the heir or heirs at law, devisee or devisees, of such debtor shall be liable to all the same suits in equity, at the suit of any of the creditors of such debtor, whether creditors by simple contract or by specialty, as they were before the passing of this act liable to, at the suit of creditors by specialty in which the heirs were bound: Provided always, that in the administration of assets by courts of equity, under and by virtue of this act, all creditors by specialty, in which the heirs are bound, shall be paid the full amount of the debts due to them, before any of the creditors by simple contract, or by specialty in which the heirs are not bound, shall be paid any part of their demands."

The judgment against an *heir*, on the bond of his ancestor, is *general* or *special*.¹ In *debt* against an heir, who pleaded *riens per discent*, or any other plea which was false within his own knowledge, and found against him, the judgment at common [*971] law was general, to recover the debt; and not special, to be levied of the lands descended.² So, if judgment be given against an heir by *nihil dicit*,³ or *non sum informatus*,⁴ or by *confession*, without shewing in certain what assets he has by descent,⁵ the judgment is general: And if the profits of the lands descended, from the death of the ancestor to the time of bringing the action, are sufficient to satisfy the demand, and the plaintiff will shew it to the court, in an action of *debt* against an heir, and the defendant cannot deny it, the plaintiff shall have a general judgment, and execution presently.⁶ But in an action of *debt* against an heir, if he acknowledge the action, and shew the certainty of the assets which he has by descent, the judgment shall be special to recover the debt, to be levied of the lands descended:⁷ And if the defendant plead *non est factum*, or any other plea which is not false within his own knowledge, there shall be a like judgment.⁸

By the statute 3 W. & M. c. 14. § 6. "where any action of debt upon specialty is brought against an heir, he may plead *riens per*

¹ 2 Rol. Abr. 70, 71. and see Vin. Abr. tit. *Heir*, C. Bac. Abr. tit. *Heir and Ancestor*, H. 2 Wms. Saund. 7. (4.)

² Dyer, 149. a. Bro. Abr. tit. *Assets per discent*, 3.

³ Dyer, 344. a. b. Flowd. 440. Cro.

Eliz. 692.

⁴ Dyer, 344. a. b. Flowd. 440.

⁵ *Id. ibid.* but see Dyer. 149. a.

⁶ Dyer, 344. b.

⁷ 2 Rol. Abr. 70. Dyer, 149. a. 373. b.

⁸ Cro. Car. 436, 7.

discent, at the time of the original writ brought, or the bill filed against him; and the plaintiff in such action may reply, that he had lands, tenements or hereditaments from his ancestor, before the original writ brought, or bill filed; and if, upon issue joined thereupon, it be found for the plaintiff, the jury shall inquire of the value of the lands, tenements or hereditaments so descended, and thereupon judgment shall be given, and execution awarded, as therein directed; but if judgment be given against such heir, by confession of the action, without confessing the assets descended, or upon demurrer, or *nihil dicit*, it shall be for the debt and damages, without any writ to inquire of the lands, tenements or hereditaments so descended." By this statute, the form of the judgment at common law is altered, on a plea of *riens per discent*, when a verdict is found for the plaintiff, on a replication that the defendant had assets.* And the judgment against a devisee upon this statute, is the same as against an heir."

The relation of judgments at common law, to the first day of the term, is taken away, as against *purchasers*, by the statute of frauds and perjuries;† by which it is enacted, that "the judge or officer who [*972] shall sign any judgments, shall, at the signing of the same, set down the day of the month and year of his so doing, upon the paper-book, docket, or record which he shall sign: which day of the month and year shall be also entered, upon the margin of the roll of the record where the said judgment shall be entered:‡ And such judgments, as against *purchasers bona fide*, for valuable considerations, of lands, tenements or hereditaments to be charged thereby, shall in consideration of law be judgments only from such time as they shall be so signed, and shall not relate to the first day of the term whereof they are entered, or the day of the return of the original, or filing the bail."

This statute is confined to *purchasers*; and does not apply, as between the parties to the suit. Therefore, if the defendant die in vacation, judgment may still be entered after his death, as of the preceding term, when he was living; and it will be a good judgment at common law, as of that term;‡ but then, the roll ought to be brought in and filed before the essoin-day of the subsequent term:§ And it seems, that if judgment be signed in term time, and in the subsequent vacation the defendant sell lands, and before the essoin-day of the next term the plaintiff enter his judgment, it shall affect the lands in the hands of the purchaser.¶

The operation of judgments upon purchasers and mortgagees, is still further limited and restrained by the 4 & 5 W. & M. c. 20. § 3.

* 2 Saund. 8. b. (4.)

† See the statute, § 3. 7.

‡ 29 Car. II. c. 3. § 14, 15. extended to Wales and the counties palatine, by the 8 Geo. I. c. 25. § 6. and see 2 Saund. 7. (5.) Sugd. *V. & P.* 446, 7.

§ See R. T. 29 Car. II. reg. 5. C. P. for the better observation of this statute. *Ante*, 789.

¶ 1 Salk. 87. 3 Salk. 116. 1 Ld. Raym.

695. 2 Ld. Raym. 766. 849. 869. 7 Mod. 2. 93. S. C. 1 Salk. 401. 7 Mod. 39. S. C. 3 Salk. 159. 3 P. Wms. 399. Willea, 428. 6 Durnf. & East, 368. 7 Durnf. & East, 20.

* 1 Salk. 87. 2 Ld. Raym. 850. 6 Mod. 191.

† 6 Mod. 191. and see Sugd. *V. & P.* 448, 9.

by which it is enacted, that "no judgment not doggeted and entered, in the books kept for that purpose, according to that act, shall affect any lands or tenements, as to purchasers or mortgagees, or have any preference against heirs, executors or administrators, in the administration of their ancestors, testators, or intestates effects." By this statute, a debt on judgment against a testator or intestate, not docketed according to the direction of the statute, is put on a level with simple contract debts: and therefore, on a plea of *plene administravit*, to *debt* on judgment against the intestate, not docketed, the defendant may give in evidence payment of bond and other specialty debts, which exhausted all the assets.^c And where leave was given to enter up judgment as of a preceding term, *nunc pro tunc*, the court of King's Bench, in order that it might [*973] not affect purchasers and mortgagees, ordered it to be docketed of the term in which the application was made.^d

The *dogget*, or as it is commonly called, the *docket* or *docquet*, is an *index* to the judgment, invented by the courts for their own ease, and the security of purchasers, to avoid the trouble and inconvenience of turning over the rolls at large.^e The practice of docketing judgments seems to have first obtained as early as the reign of King Henry the eighth,^f in the court of Common Pleas, where the dockets are entered on a separate roll, called the *docket* roll, or common docket; which is of so high an authority, as even to warrant an amendment of the judgment itself.^g But, in the King's Bench, the docket was originally nothing more than a note on parchment or paper, containing the christian and surnames of the plaintiff and defendant, the debt and damages recovered, with the term and number of the judgment roll.^h By a subsequent regulation, the defendants' names were required to be entered in a remembrance or docket alphabetically, for better finding out the judgments.ⁱ And at length, by the statute 4 & 5 W. & M. c. 20. § 2. made perpetual by the 7 & 8 W. III. c. 36. § 3. it was enacted, that "the clerk of the essoins of the court of Common Pleas, and the clerk of the doggets of the court of King's Bench, &c. shall make an alphabetical dogget, by the defendants' names, of all the judgments entered in their respective courts, of *Michaelmas* and *Hilary* terms, before the last day of the ensuing terms; and of the judgments of *Easter* and *Trinity* terms, before the last day of *Michaelmas* term; under the penalty of 100*l.*; which dogget shall contain the names of the plaintiff and defendant, with the addition of the latter, (if in the record of the judgment,) the debt damages and costs recovered, the venue and number of the judgment roll; and shall be fairly put into and kept in books in parchment, to be searched and viewed by all persons, at reasonable times, paying for every term's search *four* pence and no more."^k

^c 6 Durnf. & East, 384. 1 Esp. Rep. 313. 8. C. 1 Bos. & Pul. 307. and see 2 Saund. 7. (5.)

^d *Baker v. Baker*, executrix, H. 35 Geo. III. K. B.

^e Gilb. C. P. 164, 5. Supd. *V. & P.* 448.

^f *Ante*, 789, 90. 789. (f.)

^g T. Raym. 39. 1 Sid. 70. Cro. Car. 574.

^h R. E. 17 Jac. I. K. B.

ⁱ R. E. 1657. K. B.

^j See R. E. 5 W. & M. reg. 1. K. B. reg. 2. C. P. for the better observation of this statute. *Ante*, 789, 90.

This statute did not supersede the former practice, of docketing the judgment in parchment or paper, which is still necessary to be done by the attornies, on entering and bringing in their rolls; but was intended to operate, in addition to that practice, by requiring the dockets to be entered in alphabetical order, by the officers of the [*974] court.¹ Before the making of this statute, the judgment bound the lands, and the docket was nothing more than an *index* to find it readily.^m But now it is deemed necessary, that the judgment should be docketed, in order to bind the lands, as to purchasers and mortgagees: And if it be not docketed,ⁿ or if there be a false docket, which is as none,^o though a right judgment, the purchasers or mortgagees will be safe; and in the latter case, the party grieved must take his remedy against the attorney or officer, for not docketing it truly.

The judgment should be docketed at the time of bringing in the roll, or entering it thereon, if already brought in: And it has been said, that judgments cannot be docketed after the time mentioned in the act; and that the practice of the clerk's docketing them after that time is only an abuse, for the sake of their fees, and ineffectual to the party.^p But though the judgment be not docketed, yet under circumstances, a purchaser with notice may be affected by it in a court of equity. Thus, where a bill in equity was filed, to have satisfaction of a judgment, against a purchaser of the equity of redemption of land, or to redeem incumbrances, &c. and it appeared that the purchase was made in 1718, and the judgment not docketed till 1731; the defendant insisted on the statute 4 & 5 W. & M. c. 20.: On the other hand it was contended, that the defendant (the purchaser,) had notice of this judgment, and an allowance for it in the purchase, and that raised an equity for the plaintiff against him. By Lord Chancellor *Macclesfield*: "It is plain the defendant had notice of the judgment, and did not pay the value of the estate, and that is a strong presumption of an agreement to pay off the judgment; and since the plaintiff cannot proceed at law against the defendant upon the judgment, for want of docketing it in due time, he ought to be relieved in a court of equity:" Decreed, that the defendant pay to the plaintiff, the money *bonâ fide* due upon the judgment.^q

If an attorney neglect to enter and docket the judgment in due time, by which a loss arises to his client, it seems that he is liable to an action:^r And Lord *Mansfield* intimated, that it very much concerned the chief clerk to take care that judgments be actually entered upon the roll in due time, and docketed; for that after he has received his fees for making such entry, he would be liable to an action upon the case, to be brought by a purchaser, who should have

¹ Sugd. *V. & P.* 448.

^m Gilb. *C. P.* 165.

ⁿ 1 Str. 659. and see Barnes, 261, 2.

^o 1 Bac. Abr. 103. Gilb. *C. P.* 165. 1 Wils. 61. 2 Str. 1209. *S. C.*

^p 7 Vin. Abr. 54. pl. 6. 2 Eq. Cas. Abr. 592. pl. 8 Sugd. *V. & P.* 448. 564.

^q 7 Vin. Abr. p. 53. 2 Eq. Cas. Abr. 684. and see Sugd. *V. & P.* 449, 50. but

see 7 Vin. Abr. p. 54. 2 Eq. Cas. Abr. 592. where it is said, that the statute being express and positive, that a judgment shall not bind lands, without being docketed, notice to the purchaser, or no notice, is immaterial. *Tamen quære*; and see Cowp. 712. Sugd. *V. & P.* 449, 50.

^r 1 Str. 639. Sugd. *V. & P.* 311.

become charged with it, and had searched the roll, without finding it entered up: And he said, that the attorney who had undertaken to do this, and neglected it, would be liable indeed to the chief clerk; but still the chief clerk would be liable to the purchaser, who had suffered by this neglect.*

There is still another circumstance necessary to give effect to the judgment, as against purchasers and mortgagees of lands in *Middlesex* and *Yorkshire*; namely, that it should be registered: for, by the 5 Ann. c. 18. § 4. and several subsequent statutes,¹ "no judgment shall affect or bind any manors, lands, tenements or hereditaments, in those counties, but only from the time that a memorial of such judgment shall be entered at the register office, in such manner as therein is directed." But none of the acts extend to *copyhold* estates; or to leases at rack rents, or not exceeding twenty-one years, where the actual possession and occupation go along with the lease. The act for the county of *Middlesex* does not extend to any of the chambers in Serjeants' Inn, the inns of court, or inns of Chancery.² And although a judgment be not duly registered, yet a purchaser with notice will be affected by it, in a court of equity.³ But docketing a judgment was holden, by Lord Chancellor *Talbot*, not to amount to constructive notice; for judgments he said are infinite.⁴

A mere miscalculation of the damages recovered, will not avoid a judgment.⁵ And, during the same term in which the judgment is given, it is amendable at common law, in form or in substance;⁶ but after that term, it is amendable no further than is allowed by the statutes of amendments.⁷ Upon these statutes it has been holden, that if there be any thing to amend by, the judgment may be amended in point of form, for the misprision of the clerk;⁸ and it is amendable by the verdict.⁹ Where the defendant in *replevin* made cognizance for rent in arrear, and the jury found a verdict for him, and damages *to the amount of the rent claimed in his cognizance, [*976] without finding either the amount of the rent in arrear or the value of the cattle distrained, and judgment was entered for the damages assessed, the court of King's Bench permitted the defendant to amend his judgment, and to enter a judgment *pro retorno habendo*, after a writ of error brought.¹⁰ So, where the jury by mistake give damages in a penal action, the plaintiff may enter a *remittitur* of the damages on the record, after it is carried by writ of error to the King's Bench; and the transcript may be made conformable thereto.¹¹ And where a verdict was given for a sum exceeding the damages in the declaration, and judgment entered for the same, and

* 2 Bur. 722.

¹ 6 Ann. c. 35. § 19. 7 Ann. c. 20. § 18. 8 Geo. II. c. 6. § 1. 18. For the mode of registering judgments, see 1 Sel. 537. Imp. K. B. 443, 4. Append. Chap. XXXIX. § 32, &c.

² Sugd. *V. & P.* 459. And see further, as to these exceptions, *id.* 463, 4, 5.

³ Cowp. 712. and see Sugd. *V. & P.* 470, 71.

⁴ 2 Eq. Cas. Abr. 682. but see Amb. 680.

⁵ 3 Brod. & Bing. 309.

⁶ 8 Co. 157. Gilb. C. P. 103.

⁷ 1 Wils. 61. 2 Str. 1209. S. C. 4 Bur. 1988. 1 Marsh. 183.

⁸ 2 Str. 1132. 1156. 1182. 5 Bur. 2730.

⁹ 1 Durnf. & East, 783. 6 Durnf. & East, 1.

¹⁰ 2 Str. 787. *Ante*, 770.

¹¹ 3 Durnf. & East, 349.

¹² 1 Marsh. 180.

a writ of error upon the judgment, assigning that for cause, the court allowed the plaintiffs to amend the judgment and transcript, in a term subsequent to that in which the judgment was signed, by entering a *remittitur* for the excess.⁵ But where an executor pleaded a false plea of judgment recovered against himself, on which judgment was entered up against him for the debt and damages, *de bonis testatoris si, et si non, de bonis propriis*, and words were afterwards interlined in the judgment roll, by which the judgment *de bonis propriis* was confined to the damages only; the court of Common Pleas, on motion, would not strike out the words which had been interlined; it not appearing by whom the interlineation had been made, and the judgment being of six years standing.⁶ And where a plea was pleaded to the whole declaration, but the matter of the plea was in truth but an answer to part, and a verdict was obtained and judgment given for the plaintiff, and a writ of error brought, the court refused to allow an amendment in the record, by inserting a judgment by *nil dicit* to the part unanswered, on the ground that such amendment was unnecessary.¹ In a *qui tam* action for a penalty, on the statute of usury, it is not cause of error to enter a judgment of *misericordia*;² or, in other action, that the plaintiff is adjudged to be *in misericordia*, instead of the defendant.¹ The want of a *capiatur* or *misericordia*, or the substitution of one for the other, is aided by the statutes of jeofails;³ which have been construed to extend to the addition of a *capiatur*, where none lies.⁴ And the loss of the judgment roll may be supplied by a new entry.⁵

[*977] When the existence of a judgment is put in issue, upon a plea or replication of *nil tiel record*, it must be proved by the production of the record itself; which is inspected by the court wherein it is, if it be a record of the *same* court, or, if of a *different* court, a *certiorari* must be sued out for bringing it in.⁶ And if it be a record of an *inferior* court, the *certiorari* may be issued out of the superior one; but if it be of a *superior* court, or court of *equal* jurisdiction, there is no way to have it, but by *certiorari* and *mitimus* out of Chancery.⁷ When the existence of a judgment however is not denied, but it is merely stated by way of inducement to the action, or, wanted to prove the fact of the recovery, a sworn copy of it will be sufficient evidence for a jury;⁸ and it may be proved, as other transcripts, by a witness who has compared the copy, line for line, with the original, or has examined the copy, while another person read the original.⁹ But no copy of that so examined, however authenticated, is admitted.¹⁰ And it is necessary

¹ 4 Maule & Sel. 94. but see 2 Chit. Rep. 193. (1.)

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² 5 Taunt. 554. 1 Marsh. 211. S. C.

³ 2 Chit. Rep. 30.

⁴ 6 Durnf. & East, 255.

⁵ 2 H. Blac. 312.

⁶ 16 & 17 Car. II. c. 8. 4 Ann. c. 16. §

2. And as to the *capias pro fine*, in actions of *trespass*, &c. and the abolition of it by statute 5 W. & M. c. 12. see 2 Saund.

⁷ 1 Str. 313.

⁸ *Id.* 141. 2 Str. 833. 2 Bur. 722.

⁹ *Ante*, 804.

¹⁰ *Id. ibid.*

¹¹ Peake's Evid. 2 Ed. 29.

¹² 1 Campb. 469. 471. *in notis*. 2 Taunt. 52. Phil. Evid. 4 Ed. 387.

¹³ Gilb. Evid. 9.

that the record should be drawn up in form, before a copy of it is given in evidence; for though, by the practice of the courts at *Westminster*, the party may take out execution immediately after the judgment is signed by the proper officer, yet it is not a perfect and permanent record, till the roll is brought into court and filed.^a A judgment-paper therefore, signed by the officer, is not evidence of a judgment:^a and a verdict will not be admitted in evidence, without also producing a copy of the judgment founded thereon. The production of the *postea* alone is not sufficient: for it may happen that the judgment was arrested, or a new trial granted.⁷ But this rule will not apply to the case of a verdict on an issue directed out of Chancery, as it is not usual to enter up judgment in such case; and therefore the decree of the court must be shewn, which will be a sufficient proof that the verdict was satisfactory, and stands in force.² And though the *nisi prius* record, with the *postea* endorsed thereon, is not evidence of the verdict, it is sufficient to prove that the cause came on to be tried,^a or the day of trial.^b It is also a rule, that when, by the practice of the court, the minutes are considered as the judgment itself, and it is not usual to make any further entry, copies of such minutes may be given in evidence; as is always done in the case of minutes in the House of Lords, of the judgment given by *them on an appeal from [*978] the court of Chancery.^c And though copies of judgments must in general be stamped, yet it has been holden, that no stamp is necessary on a copy of the minutes of a judgment in the House of Lords.^d

In order to prove the proceedings in a county court, court baron, or other *inferior* court not of record, the general practice has been, to produce the book containing the original minutes of such proceedings, as well those previous to the judgment, as the judgment itself;^e for in the case of all inferior jurisdictions, it must be shewn that the proceedings are regular: And as it is not usual to draw up such judgments in form, this evidence has been deemed sufficient to support an action on a judgment of the county court;^f or to prove the proceedings on a foreign attachment in the mayor's court of *London*.⁵ In an action upon the judgment of a court in a *foreign* country, the sentence must be proved by producing it, and proving the handwriting of the judge of the court who subscribed it, and the authenticity of the seal affixed.^h A copy of a judgment in the supreme court of *Jamaica*, made by the chief clerk of the court, is not receivable in evidence here; although it appear that such copies are usually received as evidence in the island of *Jamaica*.ⁱ And in

^a Gilb. Evid. 22.

^b Bul. Ni. Pri. 228.

^c Id. 234. Willes, 367.

^d Bul. Ni. Pri. 234. and see Phil. Evid.

4 Ed. 389, 90.

^e 1 Str. 162. Willes, 368.

^f 6 Esp. Rep. 80. 83. and see 9 Price, 359. *Ante*, 933.

^g Cowp. 17. Peake's Evid. 2 Ed. 34.

^h Cowp. 17.

ⁱ Vol. II.—29

^a Com. Dig. tit. Evidence, C. 1. and see 2 Stark. Ni. Pri. 473. *Ante*, 851.

⁷ *Chandler v. Roberts*, T. 39 Geo. III. in *Scac*.

² 2 Blac. Rep. 836. and see Peake's Evid. 2 Ed. 74, 5.

⁵ Phil. Evid. 4 Ed. 343, 4, 5. 399, 400. *Ante*, 851.

² 2 Stark. Ni. Pri. 6.

an action on a judgment obtained in the island of *Grenada*, though the plaintiff proved the handwriting of the judge subscribed to the judgment, yet as he could not prove the seal affixed to be the seal of the island, he was considered as having failed in his proof; and the court on motion confirmed the nonsuit on that ground.^k It has even been holden, that if a colonial court possess a seal, it must be used for the purpose of authenticating a judgment of the court, although it be so much worn as to be no longer capable of making any impression.^l

^k 3 East, 221. and see Peake's Evid. 2 Ed. 399, 400.
Ed. 72, 3. *Id.* 73, 4. (q.) Phil. Evid. 4 ^l 1 Stark. N. Pri. 525.

CHAP. XL.

OF COSTS.

INCIDENT to the judgment are the *costs*, or expenses of the suit; which are *interlocutory* or *final*: the former, or such as are awarded on interlocutory matters, arising in the course of the suit, have been already considered, in treating of the matters to which they relate; the latter, or such as depend on the final event of the suit, will be the subject of the present Chapter.^a

No final costs were recoverable, by the plaintiff or defendant, at common law.^b But, by the statute of *Gloucester*, (6 *Edw. I.*) c. 1. § 2. it is provided, that "the *demandant* may recover against the tenant, the costs of his *writ* purchased, (which, by a liberal interpretation, has been construed to extend to the *whole* costs of his suit,^c) together with the damages given by that statute; and that this act should hold place, in all cases where a man recovers damages." This was the origin of costs *de incremento*,^d which are considered, in a legal sense, as being parcel of the damages.^e And hence the plaintiff has, generally speaking, a right to costs, in all cases where he was entitled to damages, antecedent to, or by the provisions of the statute of *Gloucester*,^f as in *assumpsit*, covenant, debt on contract, case, trover, trespass, assault and battery, replevin, ejectment, dower *unde nihil habet*,^g &c.; or where, by a subsequent statute, *double* or *treble* damages are given, in a case where *single* damages were before recoverable;^h as upon the 2 *Hen. IV.* c. 11. for wrongfully suing in the admiralty court,ⁱ &c.: And he has also a right to costs, in all cases where a certain *penalty* is given by ^astatute to the party grieved;^k for otherwise the remedy might [^a980] prove inadequate.

^a The subject of *Costs*, interlocutory as well as final, is treated of in a clear and perspicuous manner by Mr. Baron *Hullock*: And the table of costs, by Mr. *Palmer*, will also be found a valuable acquisition to the profession, as containing a full collection of bills of costs, accurately drawn, and methodically arranged, by which the practitioner may not only know what charges to make for his business, but may see before-hand in what order it is to be conducted.

^b 2 *Inst.* 288. *Hardr.* 152.

^c 2 *Inst.* 288.

^d *Gilb. Eq. Rep.* 195.

^e 9 *East*, 298. 1 *Chit. Rep.* 137. (a).

^f 10 *Co.* 116. a.

^g 2 *Bac. Abr.* 148. *Ante*, 921.

^h 10 *Co.* 116. a. 2 *Inst.* 289. *Cowp.* 368.

ⁱ *Ante*, 925.

^k *Cro. Car.* 560. 1 *Roll. Abr.* 574. *Skin.* 363. 367. *Comb.* 224. 12 *Mod.* 46. *S. C.* *Carth.* 230. 1 *Salk.* 206. *Comb.* 449. 5 *Mod.* 353. *S. C.* 1 *Ld. Raym.* 172. *Willea*, 440. *Say. Costs*, 11. 7 *Durnf. & East*, 267. 1 *H. Blac.* 10.

But the statute of *Gloucester* did not extend to cases where *no* damages were recoverable at common law, as in *real* actions,¹ nor to writs of *scire facias*, founded on the statute *Westm. 2. c. 45.*² nor to cases where the crown is the prosecutor, as in *prohibition*,³ *mandamus*, or *quo warranto*; nor where *double* or *treble* damages were given by a subsequent statute, in a new case where *single* damages were not before recoverable; as in *waste*, against tenant for life or years,⁴ upon the statute of *Gloucester*, (6 *Edw. I.*) c. 5.; for not setting out tithes,⁵ upon the 2 & 3 *Edw. VI.* c. 13.; or for driving a distress out of the hundred,⁶ upon the 1 & 2 *Ph. & M. c.* 12. Nor does this statute extend to *popular* actions, where the whole or part of a penalty is given by statute to a common informer;⁷ as upon the 5 *Eliz. c. 4. § 31.* for exercising a trade, without having served an apprenticeship; or upon the statute of usury, 12 *Ann. stat. 2 c. 16.* In these and such like cases therefore, the plaintiff is not entitled to costs, unless they are expressly given him by the statute; but wherever they are so given, he is of course entitled to them.

When *single* damages are given by a statute, subsequent to the statute of *Gloucester*, in a new case wherein no damages were previously recoverable, it has been doubted whether the plaintiff shall recover costs, if they are not mentioned in the statute. The rule in *Pilfold's case*⁸ is, that he shall not: and accordingly it is holden, that he is not entitled to costs in *quare impedit*,⁹ wherein damages are given by the statute of *Westm. 2. (13 Edw. I.) c. 5. § 3.* But the rule in *Pilfold's case* is contradicted by lord Coke himself;¹⁰ who says, that "this clause (respecting the statute of *Gloucester's* holding place, in all cases where a man recovers damages,) doth extend [*981] to give costs, where damages are given to any demandant *or plaintiff in any action, by any statute made *after* this parliament:" And the rule has been since narrowed, by several modern decisions; from whence it may be collected, that the plaintiff is entitled to costs, in all cases where single damages are given by statute to the party grieved,¹¹ although costs are not particularly mentioned in the statute.

In several of the foregoing cases, wherein costs were not recoverable by the plaintiff at common law, they are expressly given him by the statute 8 & 9 W. III. c. 11. § 3. by which it is enacted, that "in all actions of *waste*, and actions of *debt* upon the statute for not setting forth *tithes*, wherein the single value or damage found by the jury shall not exceed the sum of twenty nobles, and in all

¹ *Ante*, 921.

² *Id. ibid.* 3 Bur. 1791.

³ Comb. 20.

⁴ 2 Hen. IV. 17. 9 Hen. VI. 66. b. 10 Co. 116. b. 2 Inst. 289. *Ante*, 921.

⁵ Moor, 915. Noy, 136. Hardr. 152.

⁶ 2 Inst. 289. Dyer, 177. but see Cro. Car. 560. 1 Rol. Abr. 574.

⁷ 1 Rol. Abr. 574. 1 Vent. 133. Carth. 231. 1 Salk. 206. Comb. 449. 5 Mod.

355. S. C. 1 Ld. Raym. 172. Cas. Pr. C. P. 87. Barnes, 124. S. C. Cowp. 366. 1

H. Blac. 10. Bul. N. Pri. 333.

⁸ 10 Co. 116. a.

⁹ 2 Hen. IV. 17. 27 Hen. VI. 10. 10 Co. 116. a. 2 Inst. 289. 362. Barnes, 140. and see Cro. Car. 560. Carth. 231. Cowp. 367, 8. *Ante*, 921.

¹⁰ 2 Inst. 289.

¹¹ 2 Wils. 91. Barnes, 151. S. C. 3 Bur. 1723. Say. Costs, 10. S. C. 1 Durnf. & East, 71. 6 Durnf. & East, 355. 7 Durnf. & East, 267. but see Cowp. 367, 8.

suits upon any writ or writs of *scire facias*, and suits upon *prohibitions*, the plaintiff obtaining judgment, or any award of execution, after plea pleaded or demurrer joined therein, shall likewise recover his costs of suit; and if the plaintiff shall become nonsuit, or suffer a discontinuance, or a verdict shall pass against him, the defendant shall recover his costs, and have execution for the same by *capias ad satisfaciendum*, *fieri facias*, or *elegit*." with a *proviso*,⁷ that nothing therein contained shall be construed to alter the laws in being as to *executors* or *administrators*, in such cases where they were not then liable to the payment of costs of suit.

In an action of debt for the *penalty* of the statute 2 & 3 *Edw.* VI. c. 13. for not setting out tithes, with a count for the *single* value, the parties, after a demurrer to the declaration, submitted to arbitration, and the arbitrator awarded the single value to be less than twenty nobles (*6l. 13s. 4d.*;) the court held, that the plaintiff was not entitled to costs on the counts for the *penalty*, under the statute of 8 & 9 *W.* III. c. 11. the value not having been found by a jury: but they allowed him to have costs taxed on the count for the single value.⁸ And full costs were allowed, in an action on the statute of *Edw.* VI. for treble the value of tithes not set out, where there was a verdict for the plaintiff, subject to a reference, and the arbitrator directed a verdict to be entered for 30*s.* treble value.⁹ The plaintiff, however, is only entitled to costs, in such an action, by the statute 8 & 9 *W.* III. c. 11. § 3. after plea pleaded, or demurrer joined.¹⁰

*When a *scire facias* is not an original, distinct and inde- [*982] pendent proceeding, but connected with and forming a part of the proceedings in another action, the plaintiff, it seems, is entitled to costs thereon, as a part of the general expenses of the suit, by an equitable construction of the statute of *Gloucester*; as upon a *scire facias ad audiendum errores*, or when a *scire facias* is brought on the statute 8 & 9 *W.* III. c. 11. § 6. for assessing damages upon the death of a plaintiff or defendant, after interlocutory and before final judgment. And, after judgment by default in *debt* on bond to secure an annuity, payable quarterly, and *scire facias* thereon, suggesting a breach in non-payment of a quarter's arrears, and damages assessed to that amount on the statute 8 & 9 *W.* III. c. 11. § 8. the court of King's Bench held, that the plaintiff was entitled to his costs on the latter section, which directs a *stay* of proceedings, on payment of *future damages, costs and charges, toties quoties*, though the *third* section only gives costs in *scire facias*, after plea or demurrer.¹¹ In the King's Bench, the plaintiff must pay costs, on quashing his own writ of *scire facias*, after the defendant has appeared thereto:¹² But, in the Common Pleas, the plaintiff may move to quash his own writ, without paying costs, at any time before the defendant has pleaded;¹³ nor are any costs payable on its being

⁷ § 5. and see 1 *Str.* 188. 3 *East*, 202.

⁸ 1 *H. Blac.* 107. and see *Barnes*, 150.

⁹ 2 *Chit. Rep.* 155.

¹⁰ 1 *Bing.* 182.

¹¹ 11 *East*, 387.

¹² 1 *Barn. & Ald.* 486.

¹³ *Cas. Pr.* C. P. 74. 109. *Pr. Rep.* 378. 418. *Barnes*, 431. and see 1 *Str.* 638.

quashed after a plea in abatement:^f And the statute 8 & 9 W. III. c. 11. § 3. does not extend to a *scire facias* to repeal a patent, prosecuted in the name of the king.^g

On a *prohibition* being granted to the ecclesiastical court, in a suit for tithes, it is enacted by the statute 2 & 3 Edw. VI. c. 13. § 14. that "in case the suggestion be not proved true, by two honest and sufficient witnesses at the least, in the court where the prohibition shall be granted, within *six* months next after it is so granted and awarded, then the party who is hindered of his suit in the ecclesiastical court by such prohibition, shall, upon his request and suit, without delay, have a consultation granted in the same case, in the court where the prohibition was granted; and shall also recover double costs and damages, against the party that pursued the prohibition, to be assigned, or assessed by the court where the consultation shall be granted." This act has been construed to extend to prohibitions in suits for small tithes, as well as great;^h and the six months allowed for proving the suggestion, are to be reckoned by calendar, not by lunar months.ⁱ But the act only applies to cases [*983] where the party, who is hindered of his suit *in the ecclesiastical court by the prohibition, acquiesces in it; and then the party obtaining it must, within six calendar months, verify his suggestion, by the depositions of two witnesses, in the court which granted the prohibition; otherwise the party hindered shall have a consultation, and double costs and damages: and therefore, where a plaintiff is put to declare in prohibition, and nonsuited at the assizes, the defendant is only entitled to his *single* costs, under the statute 8 & 9 W. III. c. 11. § 3, and not to *double* costs, under the 2 & 3 Edw. VI. c. 13. § 14.^k It is doubtful whether the writ of consultation can now be granted on the latter statute;^l and if the six months be understood to relate to the trial only, it must be understood with some latitude, as in the case of suits in the *northern* counties, or of prohibitions issuing in *Trinity* term.^m

The rule as to costs in *prohibition*, on the statute 8 & 9 W. III. c. 11. is, that the plaintiff, succeeding after plea pleaded or demurrer joined, ought to have his costs from the time of the suggestion, or first motion for a prohibition, and all costs incident and subsequent thereto.ⁿ And where the defendant pleaded nothing to the merits, but only that he did not proceed in the spiritual court after the prohibition, the court ordered the defendant to pay the plaintiff's costs of the proceedings in prohibition.^o When the defendant in prohibition lets judgment go by default, the plaintiff is entitled, by the common law, to a writ to inquire of his *damages*, for the contempt in proceeding after the prohibition delivered; and of consequence, by the statute of *Gloucester*, to his *costs*.^p In this case, however, the plaintiff is only entitled to costs, from the time that the rule for a

^f 1 Str. 638. and see 2 Saund. 72. u.

^g 7 Durnf. & East, 367.

^h 2 Ld. Raym. 1172.

ⁱ *Id.* in *notis*.

^k 15 East, 574.

^l *Salter v. Greenway*, T. 22 Geo. III.

K. B.

^m *Per Buller, J.* in *Salter v. Greenway*, T. 22 Geo. III. K. K.

ⁿ Cas. Pr. C. P. 11. 1 Str. 82. 2 Str. 1062.

^o Barnes, 148.

^p Cas. Pr. C. P. 20.

prohibition was made absolute, as the defendant could not possibly be in contempt before:¹ And where the plaintiff was nonsuited, it was holden that the defendant ought only to have the costs of the nonsuit, and not what were incurred by opposing the rule to shew cause why the writ of prohibition should not be granted.² If judgment be given for the plaintiff, as to *part* of what is in issue, he is entitled to costs, although a consultation be granted as to the residue.³ And in like manner, if the defendant prevail as to *part*, he is entitled to costs.⁴ But it seems, that if the defendant succeed upon demurrer, he is not entitled to costs;⁵ this being a *casus omissus* out of the statute. *There is a *proviso* in the statute,⁶ that [*984] it shall not extend to executors or administrators; and hence it has been determined, that in prohibition they are not liable to the payment of costs.⁷

On moving for a *mandamus*, or information in nature of a *quo warranto*, a rule is either granted or refused in the first instance; and if a rule to shew cause be granted, it is either made absolute or discharged: In the latter case, the court will discharge it with or without costs, according to circumstances.⁸ But, on shewing cause against a rule for an information in nature of a *quo warranto*, the court, under particular circumstances, suffered a disclaimer to be entered by the defendant, without costs.⁹ If the rule be made absolute, a *mandamus* issues, which should regularly be returned; or an information is filed by the master of the crown office, in nature of a *quo warranto*.

As a plaintiff, at common law, might have recovered damages in an action upon the case for a false return to a *mandamus*, he is now entitled to costs, when he succeeds in such action, by the statute of *Gloucester*; and when he fails therein, the defendant has a right to costs, under the 4 *Jac.* I. c. 3.^b And, by the statute 9 *Ann.* c. 20. after reciting that divers persons who had a right to the offices of mayors, bailiffs, portreeves, and other offices within cities, towns corporate, boroughs and places, within that part of *Great Britain* called *England* and *Wales*, or to be burgesses or freemen of such cities, &c. have either been illegally turned out of the same, or have been refused to be admitted thereto, having in many of the said cases no other remedy to procure themselves to be respectively admitted, or restored to their said offices or franchises of being burgesses or freemen, than by writs of *mandamus*, the proceedings on which are very dilatory and expensive; it is enacted, that "as often as, in any of the cases aforesaid, any writ of *mandamus* shall issue out of the Queen's Bench, the courts of sessions of counties palatine, or any of the courts of grand sessions in *Wales*, and a return shall be made thereunto, it shall and may be lawful to and for the person or persons suing or prosecuting such writ of *mandamus*, to plead

¹ Cas. Pr. C. P. 21.

² Say. Costs, 137.

³ 2 Str. 1062, 3.

⁴ Barnes, 138, 9.

⁵ Brymer & Atkyns, H. 22 Geo. III. C. P.

⁶ § 5.

⁷ Cas. Pr. C. P. 158. Pr. Reg. 118.

Barnes, 127. 129. S. C. 3 East, 202.

⁸ 3 Bur. 1453. 1 Durnf. & East, 396, 405. on a *mandamus*; 2 Str. 1039. 2 Bur. 780. 4 Bur. 1963. on a *quo warranto*.

⁹ 2 Chit. Rep. 366.

^b Hull. Costs, 327, 8.

to, or traverse all or any the material facts contained within the said return; to which the person or persons making such return shall reply, take issue, or demur; and such further proceedings, and in such manner, shall be had therein, for the determination thereof, [*985] as might have been had, if the person or persons suing such writ, had brought his or their action on the case for a false return; and if any issue shall be joined on such proceedings, the person or persons suing such writ shall and may try the same, in such place as an issue joined in such action on the case should or might have been tried: and in case a verdict shall be found for the person or persons suing such writ, or judgment given for him or them upon a demurrer, or by *nil dicit*, or for want of a replication or other pleading, he or they shall recover his or their damages and costs, in such manner as he or they might have done in such action on the case as aforesaid; such costs and damages to be levied by *capias ad satisfaciendum*, *feri facias*, or *elegit*; and a peremptory writ of *mandamus* shall be granted without delay, for him or them for whom judgment shall be given, as might have been, if such return had been judged insufficient: and in case judgment shall be given for the person or persons making such return to such writ, he or they shall recover his or their costs of suit, to be levied in manner aforesaid."

But no provision being made for costs by this statute, when the writ is obeyed, the statute 12 Geo. III. c. 21. after reciting, that although a writ of *mandamus*, to admit any person to the franchise of being a citizen, burgess or freeman of any city, town corporate, borough, cinque port, or place within *England* or *Wales*, be obeyed, the person applying for the same is nevertheless put to great trouble, delay and expense, and that by the laws in being, in many cases, no provision is made for giving costs to the party suing out any such writ, when the same is obeyed; enacts, that "where any person shall be entitled to be admitted a citizen, burgess or freeman, of any such city, &c. and shall apply to the mayor or other person, officer or officers, in such city, &c. who have or hath authority to admit citizens, burgesses and freemen therein, to be admitted a citizen, burgess or freeman thereof; and shall give notice, specifying the nature of his claim, to such mayor or other officer or officers, that if he or they shall not so admit such person a citizen, burgess or freeman, within one month from the time of such notice, the court of King's Bench will be applied to, for a writ of *mandamus* to compel such admission; and if such mayor, or other officer or officers shall, after such notice, refuse or neglect to admit such person, and a writ of *mandamus* shall afterwards issue, to compel such mayor, or other officer or officers, to make such admission, and, in obedience to such writ, such person shall be admitted by the said mayor, or [*986] other officer or officers, a citizen, &c. of such city, *&c. then such person shall (unless the court shall see just cause to the contrary,) obtain and receive from the said mayor, or other officer or officers, so neglecting or refusing as aforesaid, all the costs to which he shall have been put, in applying for, obtaining and serving such writ of *mandamus*, and enforcing the same, by a rule to be made

by the court out of which such writ shall issue, for the payment thereof, together with the costs of applying for, obtaining and enforcing the said rule; and if the rule so to be made, shall not be obeyed, then the same shall be enforced, in such manner as other rules made by the said court are or may be enforced by law."

Before the exhibiting of an information in nature of a *quo warranto*, the relator ought to enter into a recognizance in £20. to prosecute the same with effect, &c. pursuant to the statute 4 & 5 W. & M. c. 18.^c And if he do not proceed to trial within a year after issue joined, the defendant is entitled to costs, to the extent of such recognizance.^d It is also enacted, by the statute 9 Ann. c. 20. § 5. that "in case any person or persons, against whom any information or informations in the nature of a *quo warranto* shall in any of the said cases" (which have been already mentioned, in treating of the costs on a writ of *mandamus*,^e) "be exhibited in any of the said courts of Queen's Bench, &c. shall be found or adjudged guilty of an usurpation or intrusion into, or unlawfully holding and executing any of the said offices or franchises, it shall and may be lawful to and for the said courts respectively, as well to give judgment of *ouster* against such person or persons, of and from any of the said offices or franchises, as to fine such person or persons respectively, for his or her usurping, &c. any of the said offices or franchises; and also to give judgment, that the relator or relators in such information named, shall recover his or their costs of such prosecution: and if judgment shall be given for the defendant or defendants in such information, he or they for whom such judgment shall be given, shall recover his or their costs therein expended, against such relator or relators; such costs to be levied in manner aforesaid."

This statute is confined to *corporate* offices.^f But, in the cases to which it applies, if any one of several issues on a *quo warranto* information, be found for the prosecutor, upon which judgment of *ouster* "is given, he is entitled to costs on all the issues.^g The pro- [*987] secutor of an information in nature of a *quo warranto* shall pay costs on this statute, for not proceeding to trial according to notice.^h And a defendant in execution for the contempt, and for costs on a *quo warranto* information, is entitled to be discharged under the lords' act.ⁱ Lastly, it is observable, that by the statute 32 Geo. III. c. 58. which gives the defendant a right to plead the statute of limitations, &c. to an information in nature of a *quo warranto*,^k "if, upon the trial of such information, the issue joined upon the plea aforesaid shall be found for the defendant or defendants, or any of them, he or they shall be entitled to judgment, and to such and the like costs, as he or they would by law have been entitled to, if a verdict and judgment had been given for him or them, upon the merits of his or their title. Provided always, that in every such case, the prosecutor

^c 1 Salk. 376. Carth. 503. S. C.

469. *Ante*, 708.

^d *Cas. temp. Hardw.* 247. 2 Str. 1042.

^e 1 Durnf. & East, 453.

^e *Ante*, 984, 5.

^h 1 Str. 33. *Say. Rep.* 130. *Ante*, 819.

^f 1 Bur. 402. 1 Blac. Rep. 93. S. C. 5
Durnf. & East, 375. 1 Barn. & Cres. 237.
2 Dowl. & Ry. 341. S. C. and see 9 East,

ⁱ 4 Durnf. & East, 809.

^k *Ante*, 708.

of such information may reply to such plea, any forfeiture, surrender or avoidance by the defendant, of such office or franchise, happening within *six* years before the exhibition of such information; whereon the defendant may take issue, and shall be entitled to costs in manner aforesaid."

The plaintiff's general right to costs being settled and established as before-mentioned, upon the footing of the statute of *Gloucester*, has been since altered, restrained, and modified, by subsequent statutes. The first statute that restrained the plaintiff's right to costs, was the 43 *Eliz.* c. 6. (extended to *Wales*, and the counties *palatine*, by the 11 & 12 *W.* III. c. 9): by which it is enacted, that "if, in any personal action to be brought in any of her majesty's courts of *Westminster*, not being for any title or interest of lands, nor concerning the freehold or inheritance of any lands, nor for any battery, it shall appear to the judges of the same court, and be so signified by the justices before whom the same shall be tried, that the debt or damages to be recovered therein shall not amount to the sum of *forty* shillings; that in every such case, the judges or justices before whom such action shall be pursued, shall not award to the plaintiff any more costs than the sum of the debt or damages so recovered shall amount to, but less at their discretion." The intention of this statute was to confine trifling actions to inferior courts;¹ and a certificate may be granted upon it, at any time after the trial of the cause.² The first instance of a certificate being [*988] granted upon this statute, was in the case of *White v. Smith*, E. 17 *Geo.* II.; wherein *Willes*, Ch. J. certified in an action for taking sand:³ since which time, there have been several instances of such certificates.⁴ When a statute prohibits an act, and gives damages for the violation, with costs of suit, it does not take away the judge's power to certify, under 43 *Eliz.* c. 6. that the damages are less than forty shillings:⁵ And accordingly, a judge's certificate upon that statute, is sufficient to deprive a plaintiff of his right of costs, notwithstanding the action be brought on stat. 11 *Geo.* II. c. 19. § 19. by which, in case the plaintiff obtain a verdict, he is entitled to full costs.⁶

The judge may certify upon the 43 *Eliz.* though there be pleas of justification.⁷ And a certificate may be granted upon this statute, in an action on the case for an injury done to the plaintiff's right of common, by digging turves;⁸ or in an action of assault, battery and imprisonment, if no actual battery be proved:⁹ and even if a battery be proved, this will not prevent the judge from certifying with respect to the imprisonment, under the 43 *Eliz.*; and though he cannot certify as to the battery, yet the plaintiff will not be entitled

¹ *Gilb. Eq. Rep.* 196. *Gilb. C. P.* 261, 2.

² *Say. Costs*, 18. 3 *Durnf. & East*, 38.

(*d.*) 5 *Barn. & Ald.* 536.

³ 2 *Str.* 1232. 1 *Wils.* 93. *S. C.* 3 *Wils.* 325.

⁴ Same cases; 1 *Kenyon*, 245. *Say. Rep.* 250. *S. C.* 2 *Wils.* 258. 3 *Durnf. & East*, 37.

⁵ 1 *Taunt.* 400.

⁶ 5 *Barn. & Ald.* 796. 1 *Dowl. & Ryl.* 413. *S. C.*

⁷ 1 *Wils.* 93, 4. *Broadbent v. Woodhead*, *York Lent. Ass.* 1794. *cor. Heath*, J.

⁸ 8 *East*, 294.

⁹ 1 *New Rep. C. P.* 255.

to full costs for that, unless the judge certify under the 22 & 23 *Car.* II. c. 9.*† But where, in an action of *trespass* for breaking and entering the plaintiff's close, and digging a ditch, and cutting down a tree, with a count on an *asportavit*, the defendant pleaded not guilty, and *liberum tenementum*, upon which the plaintiff took issue; and the material question on the trial was, whether the tree grew on the plaintiff's or the defendant's ground; the jury having found a verdict for the plaintiff, with 37*s.* damages, the value of the tree, and the judge certified under the 43 *Eliz.*; the court held, that the plaintiff was notwithstanding entitled to his full costs; for upon this record, the freehold must necessarily have come in question, and (which was considered as a conclusive criterion in cases of this sort,) the action was one which could not have been tried in an inferior court.* If there be a certificate upon this statute, the plaintiff, we have seen,† shall not have the costs of any plea pleaded with leave of the court; although the issue thereupon joined be found for him, and the judge have not certified that the defendant had a probable cause for pleading *the [*989] matter therein pleaded. But as the judges, for a long time, were unwilling to certify upon this statute, thinking it hard to deprive a plaintiff of his right to costs, merely because he had resorted to a superior court, when perhaps he could not have obtained justice in an inferior one, the legislature was obliged to interpose its authority, still farther to guard against trifling and vexatious actions.

Thus, by the 3 *Jac.* I. c. 15. § 4. it is enacted, that "if in any action of *debt*, or action upon the case upon an *assumpsit* for the recovery of any debt, to be sued or prosecuted against any citizen and freeman of the city of *London*, or any other person, being a victualler, tradesman or labouring man, inhabiting within the said city or the liberties thereof, in any of the King's courts at *Westminster*, or elsewhere out of the court of requests for the same city, it shall appear to the judge or judges of the court where such action shall be sued or prosecuted, that the debt to be recovered by the plaintiff shall not amount to the sum of *forty* shillings, and the defendant shall duly prove, either by sufficient testimony, or his own oath, that at the time of commencing such action, the defendant was inhabiting and resident in the city of *London* or the liberties thereof, the said judge or judges shall not allow to the plaintiff any costs of suit, but shall award the plaintiff to pay so much ordinary costs to the defendant, as the defendant shall justly prove, before the said judge or judges, it hath truly cost him in defence of the suit."

The jurisdiction of the court of requests for *London* was extended, by the 14 *Geo.* II. c. 10. to "every citizen and freeman of the city of *London*, and every other person and persons inhabiting

* 2 New Rep. C. P. 471.

† 9 Price, 314.

† *Ante*, 711.

† So, in an action for assault and battery, with a *separate* count for false imprisonment, where the verdict was for 1*s.* damages, and the judge certified under 43 *Eliz.* c. 6. the court refused to tax the plaintiff his costs. 2 *Bingh.* 333.

within the said city or its liberties, and also to persons renting or keeping any shop, shed, stall, or stand, or seeking a livelihood there, who have debts owing them, not exceeding the sum of *forty* shillings, by any person or persons inhabiting or seeking a livelihood within the said city or its liberties, during their respective inhabitancy or seeking a livelihood as aforesaid.”^a And, by the 39 & 40 Geo. III. c. civ.^a it was still further extended to “debts not exceeding the sum of 5*l.*^b due to any person or persons, whether residing within the city of *London* or elsewhere, or to bodies politic or corporate, and fraternities or brotherhoods, whether corporate or not corporate, from any person or persons residing or inhabiting within [*990] the said *city or its liberties, or keeping any house, warehouse, shop, shed, stall or stand, or seeking a livelihood, or trading or dealing within the same city or liberties.” And if any action or suit shall be commenced in any other court than the said court of requests, for any debt not exceeding the sum of 5*l.*, and recoverable by virtue of the former acts, or of this act, in the said court of requests, the plaintiff or plaintiffs in such action or suit, shall not, by reason of a verdict for him, her or them, or otherwise, have or be entitled to any costs whatsoever; and if the verdict shall be given for the defendant or defendants in such action or suit, and the judge or judges before whom the same shall be tried or heard, shall think fit to certify that such debt ought to have been recovered in the said court of requests, then such defendant or defendants shall have double costs, and shall have such remedy for recovering the same, as any defendant or defendants may have for his, her or their costs, in any cases by law.”^d

This act of parliament has been construed to extend to an action of *debt* for less than *five* pounds, on the judgment of a superior court.^e And the court of requests have jurisdiction under it, over a contract for the retention of tithes by the tenant, the value of which was under 5*l.*: and therefore, if the vicar sue for the same, and recover less than 5*l.* upon a count in *assumpsit* on a *quantum valebant*, the defendant may enter a suggestion on the roll, stating that he was a freeman and inhabitant of the city of *London*, trading there at the time he was served with the writ, for the purpose of ousting the plaintiff of his costs.^f The criterion in these cases is the sum recovered by the verdict: and if that be under 5*l.* the defendant is entitled to a suggestion for costs, though the action was brought for the recovery of a larger sum.^g

There are some distinctions deserving notice, between the former acts of parliament, for the recovery of small debts in *London*, and

^a See 5 Durf. & East, 535. 1 East, 353.
(a.) S. C. cited.

^b This act of parliament took effect from the 30th of September 1800, and not from the passing of the act, which was on the 9th of July preceding. 2 East, 135.

^c 6 2.

^d 5 5.

^e 6 12.

^f 2 Bos. & Pul. 588. but see 3 Esp. Rep. 280. where an action of *debt* was brought in a superior court, for less than *five* pounds on a judgment of the court of requests for *London*. See *quære*, whether the plaintiff would have been entitled to costs in such action?

^g 5 East, 194.

^h 2 Taunt. 169.

the 39 & 40 Geo. III. c. civ. By the former acts, the court of requests had no jurisdiction in a suit, unless both the plaintiff and defendant were resident within the city;^a but this is not necessary under the 39 & 40 Geo. III. c. civ. which extends the jurisdiction of the court to debts not exceeding 5*l.* due to *any* person or persons, whether residing within the city *or elsewhere*. It is necessary however, under the latter act, *that the defendant should be [*991] a person residing or inhabiting within the city or its liberties, or keeping a house, &c. or seeking a livelihood there: and if a party's residence be out of the jurisdiction of the court of requests for *London*, his occasionally underwriting a policy at *Lloyd's* coffee-house, where he has a seat, is not his seeking a livelihood within the city, so as to subject him to the jurisdiction of the court: it must be followed as a trade or business.¹ So, where a defendant resided in *Middlesex*, and kept a warehouse in the city of *London*, jointly with another person, but told the plaintiff that he did not keep the warehouse, and the plaintiff, upon enquiry in the neighbourhood where it was, could obtain no intelligence respecting him; the court of Common Pleas would not, under the above act of parliament, exempt the defendant from paying of costs, on the ground of the verdict being under *five* pounds, and that he ought to have been summoned to the court of requests.² So a market gardener, who rented a stand, with a shed over it, in *Fleet Market*, at an annual rent, which he occupied three times a week on market days, till ten o'clock in the morning, after which, and on all other days, it was occupied by others, was held not to keep a stand, within the meaning of the *London* court of requests act, so as to be privileged to be sued there for a debt under *five* pounds.³ And, in a late case, a person plying as a porter in the city of *London*, and resorting to a house of call there, but not lodging in the city, was holden not to be a person seeking his livelihood in *London*, within the meaning of the above act.⁴ It became a question in one case,⁵ which was not decided, whether the clerk of a solicitor, attending at his master's office within the city, during the hours of business throughout the day, but lodging in *Middlesex*, should be said to seek a livelihood in *London*, within the meaning of the act: But in a subsequent case,⁶ the court held, that a husband domiciled in *Middlesex*, where his wife carried on business, though he was employed as a clerk in the office of solicitors in *London*, is not privileged to be sued only in *London*, as a person seeking his livelihood there; for that means seeking the *whole* of his livelihood within the city.

^a 2 H. Blac. 220. 1 Chit. Rep. 635, 6. (a.) and see 5 Durnf. & East, 535. 1 East, 353. (a.) 1 Bing. 388.

¹ 5 Esp. Rep. 19. and see 1 Smith R. 334.

² 1 New Rep. C. P. 153. But where a person rented a counting house in the city of *London*, jointly with another person, and received orders there for his business, the court of Common Pleas

held, that he was within the jurisdiction of the court of requests for the city of *London*, though he slept and resided in *Southwark*. 5 Taunt. 648. 1 Marsh. 269. S. C.

³ 8 East, 336.

⁴ 2 Taunt. 196.

⁵ 13 East, 161.

⁶ 16 East, 147. and see 15 East, 647. Post, 992.

[*992] It should also be observed, that under the former acts, the plaintiff is not only prevented from recovering his costs, upon a suggestion that the debt is under *forty* shillings, but shall pay costs to the defendant: but the statute 39 & 40 Geo. III. c. civ. only prevents the plaintiff from recovering his costs, on a verdict in his favour for less than *five* pounds, and does not give any costs to the defendant; though if a verdict be given for the latter, he is entitled by the act to *double* costs, on the judge's certifying that the debt ought to have been recovered in the court of requests.

The court of requests in *London* having been found extremely beneficial, courts of a similar nature were, towards the end of the reign of Geo. II. established by act of parliament, in various districts in and about the metropolis; as in the town and borough of *Southwark*, &c. by the 22 Geo. II. c. 47. (explained and amended by the 32 Geo. II. c. 6.); in the city and liberty of *Westminster*, and part of the duchy of *Lancaster*, by the 23 Geo. II. c. 27. (explained and amended by the 24 Geo. II. c. 42.); and in the *Tower Hamlets*, by the 23 Geo. II. c. 30. The county court of *Middlesex* was also put on a different footing by the 23 Geo. II. c. 33. for the more easy and speedy recovery of small debts. And, in the late reign, the jurisdiction of these courts was in several instances extended to sums not exceeding *five* pounds; as in *London*, by the 39 & 40 Geo. III. c. civ. before-mentioned; in *Southwark*, and the East half hundred of *Brixton*, by the 46 Geo. III. c. lxxxvii.; in the hundreds of *Blackheath*, *Bromley*, and *Beckenham*, &c. by the 47 Geo. III. sess. 1. c. iv.; in *Birmingham*, by the 47 Geo. III. sess. 1. c. xiv.; in the town and port of *Sandwich*, and villages of *Ramsgate*, &c. by the 47 Geo. III. c. xxxv.; and in *Manchester*, by the 48 Geo. III. c. xliii.: And, in the city of *Bath* and its environs, the jurisdiction of the court of requests has been extended to sums not exceeding *ten* pounds, by the statute 45 Geo. III. c. lxxvii.^p In order to proceed under the court of requests act for *Southwark*, both plaintiff and defendant must be resident within the jurisdiction of the court.^a But in the construction of the statutes 22 Geo. II. c. 47. and 46 Geo. III. c. lxxxvii. it has been holden, that if a defendant lodge within the jurisdiction of the court of conscience act for *Southwark*, he is entitled to the benefit of the statutes; although he carry on his business, and the goods were delivered out of the jurisdiction, and the plaintiff had no knowledge of his lodging within it, till after the process was sued out.^r And no person to whom a debt is owing, not exceeding *five* pounds, and recoverable by the statutes [*993] 25 Geo. II. c. 34. & 47 Geo. III. sess. I. *c. xiv. from any person resident within the jurisdiction of the *Birmingham* court of requests, can recover costs, if he sue elsewhere than in that court;

^p For an alphabetical list of the names of the places having courts of conscience, with the statutes by which they are created, see Man. Ex. Append. 135, &c.

^a 1 Bing. 388.

^r 15 East, 647. but see stat. 4 Geo. IV.

c. cxxiii. § 14. 16, by which the clause in the *Southwark* acts, respecting costs, being repealed, the plaintiff obtaining a verdict for any sum, however trifling, is entitled to costs as in other cases.

wheresoever the plaintiff may reside, or the cause of action accrue.* So a defendant, residing within the jurisdiction of the court of requests for the city of *Bath*, is entitled to be sued in that court, for a debt under *ten* pounds, though the cause of action accrued, and the plaintiff resided out of the jurisdiction; and if such an action be brought elsewhere, the court on motion will deprive the plaintiff of costs.^c

In the above acts of parliament there are exceptions, relating to particular *causes*, and *persons*, of which, and over whom the courts have no jurisdiction. Thus, in the 3 *Jac.* I. c. 15. there is an exception or proviso,^d that "it shall not extend to any debt for *rent*, upon any lease of lands or tenements, or any other real contracts, nor to any other debt that shall arise by reason of any cause concerning a testament or matrimony, or any thing concerning or properly belonging to the ecclesiastical court, although the same be under forty shillings." And, there is a similar exception in the court of conscience acts for *Westminster*,^e the *Tower Hamlets*,^f and *Southwark*.^g and in a later act for *Southwark*,^h there is a clause, that it shall not extend to any debt for any sum, being the balance of an account on demand, originally exceeding *five* pounds.ⁱ The exception in the *London* act has been extended to an action for use and occupation;^j and also to an action for money had and received, brought against the receiver of an estate, to recover money received by him for rent, for the purpose of trying the title of the estate.^k And the court of conscience act for *London* does not extend to cases where the plaintiff recovers less than the limited sum, in a special action on the case, for the breach of an agreement,^l or in an action on the case for negligence, in driving the plaintiff's carriage, contrary to an implied *assumpsit*.^m Nor does the jurisdiction of the courts of conscience extend to contracts made on the high seas.ⁿ Also, it is a constant and invariable rule, that none of the court of conscience acts extend to cases, where the debt, being "origi- [*994] nally above the limited amount, is reduced under it, by means of a set off,^o or tender.^p And if a debt, originally above *five* pounds, be reduced under that sum by partial payments, it is within the exception of the *Southwark* act.^q But where the debt originally was under *five* pounds, the defendant is, it seems, entitled to the

* 4 Taunt. 150. 1 Chit. Rep. 636. *in motis*.

^c 3 Barn. & Ald. 210. 1 Chit. Rep. 635. S. C. and see 3 Dowl. & Ry. 51.

^d § 6. and see the statute 39 & 40 Geo. III. c. 104. § 11. 13. 1 Smith R. 396.

^e 22 Geo. II. c. 47. § 16.

^f Doug. 245.

^g 22 Geo. II. c. 47. § 16. but see the stat. 4 Geo. IV. c. cxxiii. § 14, by which the above exception is repealed; and by § 12, 13, the jurisdiction of the court is further restrained.

^h 46 Geo. III. c. lxxvii.

ⁱ § 12. and see stat. 4 Geo. IV. c. cxxiii. § 14.

^j Doug. 244. and see 13 East, 161. but it is otherwise in *Middlesex*. 2 Bos. & Pul. 29. and in the city of *Bath*, 3 Dowl. & Ry. 51.

^k 1 Barn. & Cres. 283.

^l 5 Duff. & East, 529.

^m 1 Taunt. 396.

ⁿ 1 Bos. & Pul. 223.

^o 2 Str. 1191. 1 Wils. 19. S. C. 2 Wils. 68. Barnes, 470. S. C. 3 Wils. 48. Say. Costs, 65. S. C. 1 Bos. & Pul. 223. 2 Price, 19. 2 Chit. Rep. 394.

^p Doug. 448, 9.

^q 1 Taunt. 60. and see the statute 4 Geo. IV. c. cxxiii. § 12.

benefit of the court of requests act for *London*, though he has pleaded a tender,¹ or paid money into court.^m And in general, where the reduction is made by payments in part,ⁿ or the defence of infancy,^o the plaintiff is not entitled to costs, where the damages are under the limited amount. And where a demand for plumber's work and materials, to the amount of *eight* pounds, was reduced below *five* pounds, by the plaintiff's taking and allowing for the old lead, the court of King's Bench held, that the plaintiff was not entitled to his costs under the *Southwark* act;^p and that this was not a demand reduced below five pounds by balancing an account, within the exception of the twelfth section.^q So where the plaintiff in *assumpsit*, recovered less than *five* pounds, upon the balance of an account, which contained *items* both on the *debit* and *credit* side; the defendant was allowed to enter a suggestion on the roll, to deprive him of his costs, on the *London* act.^r And it is no objection to entering a suggestion on that act, that the plaintiff *believed* he had a cause of action for more than *five* pounds.^s It is not a sufficient ground for refusing a suggestion, under the 22 Geo. II. c. 47. that a court of conscience has no authority to try a question of bankruptcy.^t And where a cause is referred to arbitration, and the costs are directed to abide the event of the suit, the plaintiff, we have seen,^u is not entitled to them, if it appear by the award that his original demand was under *forty* shillings, and he might have recovered it in a court of conscience.

The court in one instance permitted a suggestion to be entered on the roll, in an action brought by an *administrator*.^v But, in an action brought against an *executor*, they refused it;^w saying, it could not be meant to give the court of conscience a jurisdiction over executors; and that if there was no express exception, there was one [*995] implied from the nature and reason of the thing. An *attorney*, when plaintiff, is not obliged to sue for a debt under five pounds, in the court of requests for *London*;^x and, when defendant, is not subject to the jurisdiction of the county court of *Middlesex*.^y but in *London*, *Westminster*, and the *Tower Hamlets*, *Southwark*, and the East half hundred of *Brixton*, 4 Geo. IV. c. cxxiii. § 7. he is expressly subjected thereto.^b And when a person is sued in a superior court, for a debt under forty shillings, he may move the court to stay the proceedings.^c

¹ 5 Maule & Sel. 196.

^m 5 East, 194.

ⁿ Barnes, 353. 4 Bur. 2133. 8 East, 28. 347. 2 Price, 19. 3 Brod. & Bing. 257. but see 1 Bos. & Pul. 223. *semb. contra*.

^o 14 East, 301.

^p 46 Geo. III. c. lxxvii. but see the statute 4 Geo. IV. c. cxxiii. § 14. 16.

^q 14 East, 344. and see 3 Brod. & Bing. 257.

^r 1 Maule & Sel. 393.

^s 6 Taunt. 452. 2 Marsh. 145. S. C.

^t 1 Bos. & Pul. 11.

^u *Ante*, 884.

^v Doug. 246. and see 1 Bos. & Pul. 12.

^w Doug. 263. Stat. 14 Geo. II. c. 10. 5 Durnf. & East, 535. *Id.* 529.

^x 7 East, 47. 3 Smith R. 52. S. C. and see 5 Moore, 622. 2 Brod. & Bing. 698. S. C.

^y 2 Wils. 42. Doug. 380. 3 Bur. 1583. *semb. contra*; and see 2 Bos. & Pul. 29.

^b *Ante*, *74. And see the case of *Robinson v. Fickers & another*, T. 56 Geo. III. K. B. 1 Chit. Rep. 636. *in notis*; wherein the court stayed the proceedings, in an action brought against attorneys, for a debt under *five* pounds, on payment of the debt, without costs.

^c *Ante*, 565, 6.

The mode of taking advantage of these statutes is by *plea, suggestion, or motion*. When there is a prohibitory clause in the act of parliament, declaring that "no action for any debt under forty shillings, and recoverable in the court of requests, shall be brought against any person within the jurisdiction thereof, in any other court whatsoever," the proper mode of taking advantage of the act is by pleading it, or giving it in evidence under the general issue:^d And if that mode be not adopted, the court will not, after verdict, enter a *suggestion* on the record, that the defendant lived within the jurisdiction, or stay the proceedings.^e The *Tower Hamlets* act has the same prohibitory clause; and though it give no form of plea, yet it may be pleaded, or the facts which bring a case within it may be given in evidence under the general issue, to nonsuit the plaintiff,^f or obtain a verdict against him.^g In the *London* act, as well as in the acts for *Southwark* and *Middlesex*, there is no such prohibitory clause; and therefore the proper mode of proceeding upon these acts is, for the defendant to apply to the court by affidavit,^h for leave to enter a *suggestion*ⁱ on the roll, of the facts necessary to entitle him to the benefit of the act:^k which suggestion may be traversed, or demurred to:^l And where the plaintiff demurred to the suggestion, which was adjudged against him, the costs of the application were *allowed, as well as of the trial and former proceedings,^m [*996] though not, strictly speaking, costs of the defence.

The application for leave to enter a suggestion should be made before final judgment signed.ⁿ And where the plaintiff had declared in *assumpsit*, on a bill of exchange, with the common money counts, and the jury had found a general verdict for the plaintiff for *9l. 12s. 6d.* without specifying on what counts it should be entered, the court of Common Pleas, with a view to a suggestion, to deprive the plaintiff of his right to costs, on the *London* court of conscience act, allowed the verdict to be entered, under particular circumstances, on the common counts only.^o The affidavit in support of the application must state that the parties were within the jurisdiction, when the cause of action arose;^p and, in *Middlesex*, it should be sworn that the defendant was liable to be summoned to the court of requests;^q but this does not seem to be necessary in *London*.^r After judgment by default, and damages assessed under *five pounds* upon a writ of inquiry, a suggestion cannot it seems be properly entered on the roll;^s but the defendant may come into court, under the *London* act, and *move* to stay proceedings, on pay-

^d 2 H. Blac. 352.

^e 3 Durnf. & East, 453. 1 East, 354.

(a.) S. C. cited. *Turton v. Chambers*, M. 43 Geo. III. K. B.

^f 2 H. Blac. 352.

^g 1 East, 352.

^h Append. Chap. XL. § 1. 4. and for the rule of court for entering the suggestion, see *id.* § 2, 3.

ⁱ *Id.* Chap. XXXIX. § 29, 30.

^j 1 Str. 47. 50. 2 Str. 1120. 1191. Barnes, 353. 470, 71. Say. Rep. 273. Say. Costs,

64. S. C. 2 Wils. 68. Barnes, 470. S. C. Doug. 244.

^k Barnes, 471. 2 H. Blac. 354.

^l 2 Str. 1120.

^m 2 H. Blac. 354. 8 East, 239. 5 Maule & Sel. 510.

ⁿ 1 Bing. 100. *Ante*, 920. (f.)

^o 2 H. Blac. 220. 2 Taunt. 169.

^p 2 H. Blac. 356.

^q 2 Taunt. 169.

^r 1 Str. 46. 4 Maule & Sel. 171. 1 Chit. Rep. 636. *in notis*.

ment of the damages assessed, without costs:¹ and the distinction is said to be this: that where the intent is to call upon the other party to pay costs, it is necessary to enter a suggestion; but where the intent is to exonerate the party applying, and the other party is not entitled to costs, a motion is sufficient to take them from him.² It is however too late for the defendant, in the term after judgment signed and execution levied, to apply to enter a suggestion on the roll, to deprive the plaintiff of his costs, if he could have applied in the same term.³ And the defendant is not at liberty to enter a suggestion on the roll, under the *Middlesex* court of conscience act, when a verdict is found for one shilling damages, on an issue taken on a plea in abatement of misnomer.⁴

By the 21 *Jac.* I. c. 16. § 6. it is enacted, that "in all actions upon the case for slanderous words, to be sued or prosecuted in any of the courts of record at *Westminster*, or in any court whatsoever that hath power to hold plea of the same, if the jury upon the trial of [*997] the issue in such action, or the jury that shall inquire of the damages, do find or assess the damages under *forty* shillings, then the plaintiff or plaintiffs in such action shall have and recover only so much costs, as the damages so given or assessed amount unto, without any further increase of the same; any law statute or usage to the contrary notwithstanding." The operation of this statute is confined to actions for slanderous words spoken of the person; and does not extend to an action for a libel,⁵ or for slander of title,⁶ &c. wherein the special damage is the gist of the action: neither, for the same reason, does it extend to an action for special damage, in consequence of words not in themselves actionable;⁷ though, when the words are actionable in themselves, a special damage will not take the case out of the statute.⁸ This statute extends to actions brought in inferior courts, having power to hold plea to the amount of *forty* shillings: And though it was holden, that courts baron and other inferior courts, wherein the jury are precluded from legally assessing damages to that amount, were not within the meaning or intent of the statute, but that such courts had still a power of allowing full costs in actions for slander prosecuted therein, however small the *quantum* of damages found or assessed might be;⁹ yet now, by the statute 58 Geo. III. c. 30. § 2. "in all actions or suits for slanderous words, to be sued or prosecuted in any court whatsoever, which hath not jurisdiction to hold plea to the amount of *forty* shillings in such actions or suits, if the jury, upon the trial of the issue in such action or suit, or the jury that shall inquire of the damages, do find or assess the damages under *thirty* shillings, then the plaintiff or plaintiffs in such action or suit shall have and

¹ 8 East, 239. and see 2 H. Blac. 351. 2 Bos. & Pul. 588. 1 Chit. Rep. 636. in *notis*.

² 1 Taunt. 397. *per Best*, serjeant.

³ 2 Maule & Sel. 348.

⁴ *Welchen v. Le Pelletier*, H. 49 Geo. III. K. B. 1 Chit. Rep. 636. in *notis*.

⁵ *Hall v. Warner*, T. 24 Geo. III. K. B.

⁶ Cro. Car. 141. 163. 1 Str. 645.

⁷ 2 Ld. Raym. 831. 1 Salk. 206. 7 Mod. 129. S. C. Willea, 438. Barnes, 132. S. C. *Id.* 135. 2 H. Blac. 531.

⁸ 2 Ld. Raym. 1588. 2 Str. 936. S. C. Willea, 438. Barnes, 132. S. C. *Id.* 142. 3 Bur. 1688. 2 Blac. Rep. 1062. Say. Costs, 25. S. C. Cas. Pr. C. P. 137. *contra*.

⁹ 1 Ld. Raym. 181. and see Hul. Costs, 38.

recover only so much costs, as the damages so given or assessed shall amount to, without any further increase of the same." The statute 21 *Jae.* I. c. 16. also applies to a writ of *inquiry*, as well as a *trial*, where the damages are under *forty* shillings;^e and a *justification* found for the plaintiff will not, in that event, entitle him to full costs.^f

But the principal statute, made for restraining the plaintiff's right to costs, is the 22 & 23 *Car.* II. c. 9. (extended to *Wales*, and the counties *palatine*, by the 11 & 12 *W.* III. c. 9.) by which it is "enacted, that "in all actions of *trespass, assault and battery, and other personal actions*, wherein the judge, at the trial of the cause, shall not find and certify under his hand, upon the back of the record, that an assault and battery was sufficiently proved by the plaintiff against the defendant, or that the freehold or title of the land mentioned in the plaintiff's declaration was chiefly in question, the plaintiff, in case the jury shall find the damages to be under the value of *forty* shillings, shall not recover or obtain more costs of suit, than the damages so found shall amount unto." It seems to have been the intention of this statute, that the plaintiff should have no more costs than damages, in any personal action whatsoever, if the damages were under forty shillings, except in cases of battery, or freehold; and not even in these, without a certificate: and this construction was adopted in some of the first cases that arose upon the statute.^g But a different construction soon prevailed: and it is now settled, that the statute is confined to actions of assault and battery; and actions for *local* trespasses, wherein it is possible for the judge to certify, that the freehold or title of the land was chiefly in question.^h Therefore it does not extend to actions of *assumpsit*, debt, covenant, trover,ⁱ false imprisonment, or the like; or to actions for a mere assault;^k or for criminal conversation,^l or battery of the plaintiff's servant,^m *per quod consortium, vel servitium amisit*.

In actions for *local* trespasses, the statute applies, whenever an injury is done to the *freehold*,ⁿ or to any thing *growing*^o upon, or *affixed*^p to the freehold: and in a modern case,^q it was carried still further. That was an action of trespass *quare clausum fregit*: the first count stated, that the defendants broke and entered the close of the plaintiffs, and the grass of the plaintiffs there then growing, with their feet in walking, trod down, spoiled and consumed: and dug up and got divers large quantities of turf, peat, sods, heath,

^e 2 Str. 934.

^f Barnes, 128. Cas. Pr. C. P. 22, 2 Wils. 258. 4 East, 567.

^g 2 Keb. 849. 3 Keb. 121. 247.

^h T. Raym. 487. T. Jon. 232. 2 Show. 258. 8 C. 3 Mod. 39. 1 Salk. 208. 1 Str. 577. Gilb. Eq. Rep. 195. Barnes, 134. 3 Wils. 322. S. C. 1 H. Blac. 294. 2 East, 162. *per Lawrence*, J. 7 East, 328.

ⁱ 3 Keb. 31. 1 Salk. 208.

^k 3 Durnf. & East, 391. but see 6 Durnf. & East, 562.

^l 2 Blac. Rep. 854. 3 Wils. 319. S. C.

^m 3 Keb. 184. 1 Salk. 208. 1 Str. 192.

ⁿ 2 Vent. 48. Com. Rep. 19. 1 Salk. 208.

^o 1 Str. 577. 633. 645. Gilb. Eq. Rep. 195.

^p Str. 726. 2 Id. Raym. 1444. S. C. 6 Durnf. & East, 281.

^q *Hill v. Reeves*, Bul. Ni. Pri. 330.

Barnes, 144. 7 East, 325.

^r *Birch v. Daffey*, Bul. Ni. Pri. 330.

^s 1 Str. 633. Cas. Pr. C. P. 86. Barnes, 121.

^t 6 Durnf. & East, 281. 7 East, 325.

^u Doug. 779. and see 1 Str. 633. 645.

Gilb. Eq. Rep. 197, 8. S. C. 3 Bur. 1282.

^v Say. Costs, 50. S. C. *accord*. but see 2

Vent. 215. Skin. 66. Com. Rep. 19. 1

Salk. 208. 1 Str. 192. *semb. contra*.

stones, soil and earth of the plaintiffs, in and upon the place in which, [*999] &c. and *took and carried away the same, and converted and disposed of the same to their own use: There was another count, upon a similar trespass in another close. The defendants pleaded the general issue to the *whole* declaration, and two special pleas to the *second* count; and on the trial, a verdict was found for the plaintiffs on the general issue, with one shilling damages, and for the defendants on the special pleas; and the judge had not certified. *Per Lord Mansfield*: "The question on this record is, whether the plaintiffs are entitled to any more costs than damages, under the statute 22 & 23 Car. II. c. 9.? There is a puzzle and perplexity in the cases on this part of the statute, and a jumble in the reports: and as the question is a general one, we thought it proper to consult all the judges; and they are all of opinion, that this case is within the statute, and that the plaintiffs ought to have no more costs than damages. You will observe, that what has been called an *asportavit* in this declaration, is a mode or qualification of the injury done to the land: The trespass is laid to have been committed on the land, by digging, &c. and the *asportavit* as part of the same act; and on the trial of the issue, the freehold certainly *might* have come in question. This is clearly distinguishable from an *asportavit* of personal property, where the freehold cannot come in question, and which therefore is not within the act: Thus, after trees are cut down, and thereby severed from the freehold, if a trespasser come and carry them away, that case is not within the statute, because the freehold cannot come in question; here it might."

In an action for *mesne* profits, if the plaintiff recover less than forty shillings damages, and the judge do not certify that the title came in question, the plaintiff is entitled to no more costs than damages.* And where, to a declaration in *trespass* for throwing down, *burning* and *destroying* the plaintiff's hedge or fence, affixed to the freehold, the defendant pleaded the general issue, and a justification of throwing down the hedge, under a right of common, which was found for him, and there was a verdict for the plaintiff, with twenty shillings damages, on the general issue; the court held, that the facts stated in the special plea could not be taken into consideration, to shew that the title to the freehold could not come in question; and as it might have been in issue on the declaration, and the judge did not certify, the plaintiff was entitled to no more costs than damages.* But in *trespass* for breaking and entering a *free warren*, the plaintiff shall have full costs, though the damages be under forty shillings.*

[*1000] When an injury is done to a *personal* chattel, it is not within the statute;† nor where an injury to a personal chattel is laid in the same declaration with an assault and battery, or local trespass;‡ and consequently, in these cases, though the damages be

* 1 Esp. Rep. 359. 6 Durnf. & East, 208. 1 Str. 534. Gilb. Eq. Rep. 197. S. C. 593. S. C. 1 Stark. Ni. Pri. 55.

* 7 East, 325. *Sed. vide post*, 1001, 2.

† 2 Blac. Rep. 1151.

* 3 Keb. 389. 469. T. Jon. 232. 1 Salk.

* 3 Mod. 39. 1 Salk. 208. 1 Str. 192.

551. Gilb. Eq. Rep. 127. S. C. Barnes,

119, 20. 134. 3 Wils. 322. S. C. 2 Str.

under forty shillings, the plaintiff is entitled to full costs, without a certificate. But then it must be a substantive and independent injury: for where it is laid or proved merely in aggravation of damages, as a mode or qualification of the assault and battery, or local trespass,⁷ or there is a verdict for the defendant upon that part of the declaration which charges him with an injury to a personal chattel,² it is within the statute. So where a *laceravit*, or tearing the plaintiff's clothes, is laid in the declaration, or found by the jury, to be merely consequential to,⁸ or committed at the same time⁹ as an assault and battery, the plaintiff, recovering less than forty shillings damages, is not entitled to full costs, without a certificate. And, in a late case, it was holden by the court of Common Pleas, that if the plaintiff declare in one count for assaulting him, and beating his horse on which he was riding, whereby it was injured, and the jury give a verdict with general damages under forty shillings, the plaintiff shall have no more costs than damages.⁶

The certificate required by this statute need not, it seems, be granted at the trial of the cause.^{4†} And where the defendant lets judgment go by default,⁵ or *justifies* the assault and battery,⁷ or pleads in such a manner as to bring the freehold or title of the land in question, on the face of the record,⁸ a certificate is holden to be unnecessary. So where, to a declaration, stating that the defendant made an assault on the plaintiff, and beat, bruised, wounded and ill treated him, the defendant pleaded the general issue, and a justification as to the assaulting and ill treating only, by a plea of *molliter manus imposuit*, the court of Common Pleas held, that the latter plea admitted a battery, and that the plaintiff was entitled to full costs, although he had obtained a verdict for one shilling damages only, and the judge had not certified at the trial.¹⁰ But the plaintiff in trespass **quare clausum fregit*, recovering less than [*1001] forty shillings damages, is not entitled to costs of increase, merely because a *view* was granted before trial, though upon the application of the defendant.¹¹ And where, in an action for an assault and battery, the defendant justifies the assault only,¹² or an assault only is certified by the judge,¹³ the plaintiff, recovering less than forty shillings, is not entitled to more costs than damages; though, in the latter case, to entitle him to full costs, the judge may certify, on the 8 & 9 W. III. c. 11. § 4. that the assault was wilful and malicious.¹⁴

1120. Say. Costs, 39. 1 Stark. *Ni. Pri.*

55. but see 1 Esp. Rep. 255.

⁷ 1 Str. 624. *Powell v. Ellet*, T. 21 Geo.

III. K. B. *Ante*, 999.

² 2 Vent. 180. 195. Cas. Pr. C. P. 118.

⁸ Say. Rep. 91. 1 Durnf. & East, 655.

⁹ 1 H. Blac. 291. 5 Durnf. & East, 482.

¹⁰ 1 Taunt. 357.

¹¹ 11 Mod. 198. *Post*, 1004.

¹² Bul. *Ni. Pri.* 329.

⁶ Durnf. & East, 562.

⁸ 9 Price, 314.

⁷ 7 Taunt. 689. 1 Moore, 420. S. C.

¹¹ East, 184. 1 Ld. Raym. 76. 2 Salk.

665. S. C. *contra*.

¹³ 3 Durnf. & East, 391. and see 1 Taunt.

16.

¹² Lev. 103.

¹⁴ 3 Wils. 326.

† Vide *post*, p. *1004. note (†) as to the time when a certificate under the statute 22 and 23 Car. II. c. 9. may be granted.

The *award* of an arbitrator is not tantamount to a judge's certificate, under the 22 & 23 *Car. II. c. 9.*^a Therefore, where a verdict was taken for 10*l.* in *trespass*, subject to an award of damages, and the costs were directed to abide the event, if the arbitrator find less than forty shillings damages, the plaintiff cannot have his costs, though it be also found that the trespass was wilful, and that the defendant should pay the plaintiff his costs: for costs being directed to abide the event, means the legal event; and the authority of a judge to certify for costs under the 22 & 23 *Car. II. c. 9.* when the trespass is wilful, is not transferred to the arbitrator under such a rule of reference.^b

When the plaintiff recovered less than forty shillings damages, and the plea or issue, though special, was *collateral* to the question of freehold or title to the land, as where the defendant justified an entry as bailiff under process, and issue was joined upon the doors being shut,^c or where, upon a plea of a distress for rent, there was an issue on the defendant's being bailiff,^d a certificate was formerly holden to be necessary, to entitle the plaintiff to full costs: for it was considered, that the plaintiff, who recovered less than forty shillings damages, in trespass *quare clausum fregit*, was not entitled to full costs, unless the freehold or title appeared to have come in question, either by the judge's certificate, or by the pleadings. But it has since been determined, in several cases,^e that if the defendant, in trespass *quare clausum fregit*, plead a licence, or other justification which does not make title to the land, and it is found against him, the plaintiff is entitled to full costs, though he do not recover forty shillings damages: The principle on which [*1002] these determinations have "proceeded is, that where the case is such that the judge who tries the cause cannot in any view of it grant a certificate, it is considered to be a case out of the statute.^f So, on a plea of not guilty to a new assignment of *extra viam*, the plaintiff obtaining a verdict for less than forty shillings damages, is entitled to full costs, without a judge's certificate;^g unless the way pleaded be set forth by metes and bounds.^h And when the plaintiff is entitled to costs upon the new assignment, he is entitled to the costs of all the previous pleadings.ⁱ But if a defendant plead a justification in *trespass*, and the plaintiff, without traversing it, new assign a trespass not concerning his title, &c. on which issue is joined, and found for him, the plaintiff, obtaining a verdict for less than forty shillings, is entitled to no more costs than damages, under the statute 22 & 23 *Car. II. c. 9.*^j

None of the statutes made for restraining the plaintiff's right to

^a 3 Durnf. & East, 138. *Ante*, 884. and see 1 Marsh. 235.

^b 5 East, 489.

^c 2 Barnard. K. B. 277.

^d Say, Rep. 250. 1 Kenyon, 245. S. C.

^e 2 H. Blac. 2. 341. 7 Durnf. & East, 659. but see 7 East, 325. *semb. contra*.

^f 7 Durnf. & East, 660.

^g 2 Lev. 234. 2 Ld. Raym. 1444. 2 Str. 726. S. C. *Id.* 1168. Say. Rep. 251. *Cock-*

erill v. Allanson, T. 22 Geo. III. K. B. Hul. Costs, 86. S. C. 1 East, 350. 3 Barn. & Ald. 443. but see Barnes, 124. 129. S. C. *Id.* 149. Bul. Ni. Pri. 330. *contra*.

^h *Cockerill v. Allanson*, T. 22 Geo. III. K. B. Hul. Costs, 86. S. C. 1 East, 351. and see 9 Price, 336. *Post*, 1009.

ⁱ 1 Durnf. & East, 636.

^j 4 Taunt. 98.

costs, except the 21 *Jac.* I. c. 16.² extended to actions brought in an *inferior* court: And though the defendant removed the cause, and a verdict was given in the court above for the plaintiff, with damages under *forty* shillings, yet it was holden, that the plaintiff should have his full costs; because he had made his election to sue in the inferior court, where he would have had such costs, and the defendant could not deprive him of that advantage by removing the cause." But now, by the statute 58 Geo. III. c. 30. § 1. "in all actions or suits of trespass for assault and battery, to be commenced in any court having, or which by his majesty's writ of *justices* may have, jurisdiction to hold pleas in actions or suits to the amount of *forty* shillings, (other than his majesty's courts at *Westminster*, the court of Great Sessions for the principality of *Wales*, or the county palatine of *Chester*, the court of Common Pleas for the county palatine of *Lancaster*, or the court of Pleas for the county palatine of *Durham*,) if the jury, upon the trial of the issue in such action, or the jury that shall inquire of the damages, do find or assess the damages under *forty* shillings; or if the action be sued or prosecuted in any court whatsoever, which hath not jurisdiction to hold plea to the amount of *forty* shillings, if the jury, upon the trial of the issue in such action, or the jury that shall inquire of the *damages, do find or assess the damages under *thirty* shil- [*1003] lings; then the plaintiff or plaintiffs in such action or suit shall have and recover only so much costs, as the damages so given or assessed shall amount to, without any further increase of the same." It has however been holden, that the statute 22 & 23 *Car.* II. c. 9.³ as well as the 21 *Jac.* I. c. 16.⁴ only restrain the *court* from awarding more costs than damages; but the *jury*, not being restrained thereby, may give what costs they please.

The restraint put upon the plaintiff's general right to costs, by the 22 & 23 *Car.* II. c. 9. has been since *partly* taken off, by subsequent statutes. Thus, by the statute 4 & 5 *W. & M.* c. 23. § 10. after reciting that great mischiefs ensue by inferior tradesmen, apprentices, and other dissolute persons, neglecting their trades and employments, who follow hunting, fishing, and other game, to the ruin of themselves and damage of their neighbours, it is enacted, that "if any such person shall presume to hunt, hawk, fish or fowl, (unless in company with the master of such apprentice, duly qualified by law,) such person shall be subject to the penalties of this act, and shall or may be sued or prosecuted for his wilful trespass, in such his coming on any person's land; and if found guilty thereof, the plaintiff shall not only recover his damages thereby sustained, but his *full* costs of suit; any former law to the contrary notwithstanding." It has been holden, that a *clothier* is an inferior tradesman, within the meaning of this statute;⁴ and it is said, that the words "*inferior tradesmen*" extend to every tradesman who is

² *Ante*, 996, 7.

³ *Cas. Pr. C. P.* 45. (a.) and see 2 *Lev.* 124. 4 *Mod.* 378, 9. 1 *Ld. Raym.* 395. *Hul. Costs*, 39. 45.

⁴ *Cas. Pr. C. P.* 45. *Pr. Reg. C. P.* 112.

8. C.

¹ 1 *Salk.* 207.

⁴ *Barnes*, 125. and see 1 *Ld. Raym.* 149. *Com. Rep.* 26. S. C.

not qualified to kill game:^d but this was doubted in a subsequent case,^e wherein the judges were divided in opinion upon the question, whether a *surgeon* and *apothecary* should be considered as an inferior tradesman. And in *trespass* for hunting, laid upon the statute 4 & 5 W. & M. against the defendant as a *dissolute* person, &c. if the plaintiff prove the trespass, but not the circumstances under the statute, he shall nevertheless recover as in a common action of trespass.^f

So, by the 8 & 9. W. III. c. 11. § 4. for the preventing of wilful and malicious trespasses, it is enacted, that "in all actions of trespass, to be commenced or prosecuted in any of his majesty's courts of record at *Westminster*, wherein at the trial of the cause it shall appear, and be certified by the judge under his hand, upon the [*1004] back of the [record, that the trespass, upon which any defendant shall be found guilty, was *wilful* and *malicious*, the plaintiff shall recover not only his damages, but his *full* costs of suit; any former law to the contrary notwithstanding."^g The certificate required by this statute, need not be granted at the trial of the cause;^h and if it appear on the trial, that the trespass, however trifling, was committed after notice, and the jury give less than forty shillings damages, it has been usual for the judge to consider himself bound to certify that the trespass was wilful and malicious, in order to entitle the plaintiff to his full costs.ⁱ The granting of a certificate however, upon this statute, seems to be discretionary in the judge before whom the trial is had, who may certify or not, according as it appears to him, under the circumstances proved, that the trespass was wilful and malicious: And the judge having declined to certify, in a case where notice was given by the plaintiff's wife to the defendant, not to enter the *locus in quo* in his cart, there being no road there, notwithstanding which the defendant persisted in going on, in the exercise of a disputed right of common in an adjoining inclosure of the plaintiff, which right was found for the defendant on a justification pleaded, the court refused to interfere.^k

The plaintiff's right to costs is still further abridged, by several modern acts of parliament. Thus, by the *Welsh judicature* act, 13 Geo. III. c. 51. § 1. "in case the plaintiff in any action upon the case for words, debt, trespass on the case, assault and battery, or other personal actions,^l where the cause of action shall arise in

^d Barnes, 125. and see 1 Ld. Raym. 149. Com. Rep. 26. S. C.

^e 2 Wils. 70. Say. Costs, 54. S. C.

^f 2 Blac. Rep. 900.

^g For the exposition of this statute, see 3 Wils. 325.

^h *Swinmerton v. Jarvis*, E. 22 Geo. III. C. P. 1 Durnf. & East, 636. 6 Durnf. & East, 11. 7 Durnf. & East, 449. K. B. but see 2 Wils. 21. Doug. 108. n. *contra*.

ⁱ 6 Durnf. & East, 11. and see 7 Durnf. & East, 449.

^k 3 East, 495. *Wood v. Watkins*, H. 43. Geo. III. K. B. but see 5 Durnf. & East, 273. *semb. contra*.

^l An action of *covenant*, for not levying a fine, is held to be a *personal* action, within the meaning of this statute. 1 New Rep. C. P. 267.

† But may be granted at any time between verdict and final judgment. 4 Dowl. & Ryf. 147. So also, a certificate under the Stat. 22 & 23 Car. II. c. 9. *Id.* 156.

Wales, and which shall be tried at the assizes at the nearest English county to that part of *Wales* in which the cause of action shall be *laid* to arise, shall not recover, by verdict, a debt or damages to the amount of *ten* pounds; if the judge who tried the cause, on evidence appearing before him, shall certify on the back of the record of *nisi prius*, that the defendant was resident in *Wales*, at the time of the service of the writ, or other mesne process served on him; on such fact being suggested on the record or judgment roll, a judgment of nonsuit shall be entered against the plaintiff,^a and the defendant shall be entitled to, and have like judgment and remedy to [*1005] recover his costs against the plaintiff, as if a verdict had been given by the jury for the defendant; unless the judge, before whom the cause shall be tried, shall certify on the back of the record, that the freehold or title of the land mentioned in the plaintiff's declaration was chiefly in question, or that the cause was proper to be tried in such English county." And, by § 2. "in all *transitory* actions, arising within the principality of *Wales*, which shall be brought in any of his majesty's courts of record out of the said principality, if the venue therein shall be laid in any county or place out of the said principality, and the debt or damages found by the jury shall not amount to the sum of *ten* pounds, and it shall appear upon the evidence given on the trial, that the cause of action arose in *Wales*, and that the defendant was resident therein at the time of the service of any writ, &c. and it shall be so certified, under the hand of the judge who tried the cause, upon the back of the record of *nisi prius*; on such facts being suggested on the record or judgment roll, a judgment of nonsuit shall be entered thereon against the plaintiff,^a and he shall pay to the defendant his costs of suit, &c.: and, in the taxation of costs, the proper officer shall allow to the plaintiff, out of the defendant's costs, the full sum given him by the verdict."

In actions or prosecutions on the *revenue* laws, it is enacted by the statute 28 Geo. III. c. 37. § 24. that "in case any information or suit shall be commenced and brought to trial, on account of the seizure of any goods, wares or merchandize, seized as forfeited, by virtue of any act or acts of parliament relating to his majesty's revenues of *customs* or *excise*, or of any ship, vessel or boat, or of any horse, cattle or carriage, used or employed in removing or carrying the same, wherein a verdict shall be found for the claimer thereof, and it shall appear to the judge or court before whom the same shall be tried or heard, that there was a probable cause of seizure, the judge or court shall certify that there was a probable cause for making such seizure; and in such case, the claimant shall not be entitled to any costs of suit whatsoever."^o

In actions upon *judgments*, it is enacted by the statute 43 Geo. III. c. 46. § 4. that "the plaintiffs shall not recover or be entitled to any costs of suit, unless the court in which such action shall be brought, or some judge of the same court, shall otherwise order."^p

^a Append. Chap. XXXIX. § 24.

^a Append. Chap. XXXIX. § 24.

^o And see the statutes 19 Geo. II. c. 34.

§ 16. 23 Geo. III. c. 70. § 29. *Reynolds v. Couper*, E. 22 Geo. III. K. B. *Ante*, 923.

^p 2 Blac. Rep. 785.

Upon this statute, judgment signed and execution taken out for [*1006] costs, in an action upon a judgment, without leave of the court or a judge, is irregular.^a But the statute does not extend to an action brought by the defendant, to recover the costs of a judgment of nonsuit, but only to judgments recovered by plaintiffs.^b And where a defendant, against whom judgment had been obtained, sued out a writ of error, and to an action on the judgment pleaded *nul tiel record*, the court of Common Pleas allowed the plaintiff his costs of the action upon the judgment.^c So, where recognizances of bail were taken in the Common Pleas, and bail were sued in that court to judgment, but having no property, actions were brought on the judgment in the King's Bench, in order to take their persons, costs were allowed by the court *nunc pro tunc*.^d And, in an action on a judgment, the latter court refused to stay proceedings, on payment of the debt without costs, where there was probable ground for the plaintiff's also claiming *interest* on part of the debt.^e In actions against *justices* of the peace, on account of a conviction, or any thing done by them for carrying the same into effect, in case such conviction shall have been quashed, the plaintiff, we have seen,^f besides the value and amount of the penalty, in case the same shall have been levied, shall not be entitled to recover any costs of suit; unless it shall be expressly alleged in the declaration, that such acts were done maliciously, and without any reasonable or probable cause; nor in case it shall be proved at the trial, that such plaintiff was guilty of the offence whereof he had been convicted, or on account of which he had been apprehended, or had otherwise suffered, and that he had undergone no greater punishment than was assigned by law to such offence.

Many cases have occurred, independently of the statute 4 Ann. c. 16. in which the question has been made, both in the King's Bench and Common Pleas, whether a defendant is entitled to any costs, where, there being several counts in a declaration, the plaintiff has obtained a verdict upon one only; and it has been uniformly holden, that in such case costs shall not be taxed for the defendant on such counts as may have been found for him, not only in cases where the substantial cause of action is the same in all the counts, and only varied by the manner of stating it,^g but also where, to different counts of a declaration, there have been different pleas, and issues on those pleas, and one or more of the issues have been found for the plaintiff, and the rest for the defendant: In such case it has also been determined, that the defendant shall not have costs taxed [*1007] on the issues found for him. Thus, where the defendant in *trespass* pleaded several justifications to two counts, for different trespasses in different places, and on the trial all the issues were found for him, except an issue on not guilty to a new assignment, which was found for the plaintiff; the court, on argument, held the plaintiff was entitled to one penny damages and one penny costs, the

^a 1 Chit. Rep. 190.

^b 14 East, 343.

^c 5 Taunt. 264.

^d 1 Chit. Rep. 190.

^e *Id.* 473.

^f *Ante*, 923, 4.

^g 2 Blac. Rep. 800. 1199.

jury having found the verdict for him with one penny damages, and that the defendant was not entitled to any costs.^a So, where the defendant in *trespass* pleaded three different justifications, to three different counts, and on issue joined in the Common Pleas, had a verdict for him on two, and against him on the third; on motion, this was holden not to be a case within the act, and that the plaintiff was entitled to costs at common law on the whole declaration.^a So where a declaration, in an action on the *case*, contained one count in *trover*, and another for *words*, and the defendant pleaded not guilty to the first count, and a justification to the second count, and there was a verdict for the plaintiff on the count in *trover*, and for the defendant on the other count, the court held that the defendant should not have costs taxed on the issue found for him: and *Buller, J.* said, the practice of the court is uniform, not to allow the defendant costs in cases of this sort.^b And where an action of *trespass* was brought against two defendants, for taking the plaintiff's goods; and they pleaded, first, the general issue; and secondly, separate justifications, under a judgment and execution against the goods of a third person; and at the trial, a verdict was found for both the defendants, on their pleas of justification, as to the greater part of the goods; but it turned out that there were some goods taken, the property of the plaintiff, and a verdict was consequently found against them, as to those goods, upon the general issue; which verdict was afterwards ordered to be entered for one of the defendants generally, but as to the other defendant, it was left undisturbed; the court held, that the latter defendant was not entitled to any costs, on the issue found for him.^c

So, in *assumpsit*, where the defendant pleads *non assumpsit* as to all but a particular sum, and as to that sum a *tender*; and on the trial, the fact of the tender is found for him, but that the sum tendered was not sufficient, by which the plaintiff has a verdict on the general issue, and judgment for his damages and costs; in such case, there is not an instance of the costs of the issue, on the plea of tender, ever having been taxed for the defendant.^d So where, in a similar case, *the issue on the plea of tender was found for the plaintiff, [*1008] and on *non assumpsit* for the defendant, the plaintiff was holden to be entitled to the general costs of the cause.^e And, in a modern case, where in *assumpsit* against an executrix, the defendant pleaded the general issue and the statute of limitations to the whole declaration, and as to a particular sum, that the promises were made by the defendant's testator and one A. B. jointly, which A. B. survived the testator, and is still living; and this last issue was found at the trial for the defendant, and the other two issues for the plaintiff, who thereupon had judgment for the rest of his damages and costs; the court, after a full investigation of the subject, held that the defendant was not entitled to have the costs of the issue found for her deducted

^a Barnes, 149.

^b Bul. Ni. Pri. 335.

^c Doug. 677.

^d 4 Barn. & Ald. 43. 700.

^e 5 East, 262.

^f 5 Taunt. 660.

from the costs of the trial, which the plaintiff was entitled to on the issues found for him.^f

From these authorities, the practice appears to have been settled, in both courts, that wherever a plaintiff succeeds on a trial, as to any part of his demand, divided into different counts in his declaration, whether the defendant has pleaded one plea to all the counts jointly, or pleaded to them separately, and separate issues have been joined, on some of which he has succeeded, yet he has never been allowed costs, on that part of the plaintiff's demand which has been found against the plaintiff.^g And the same rule has prevailed, where a defendant has succeeded on a *demurrer*, as to part of the plaintiff's demand.^h Thus, where the declaration consisted of two counts, and the defendant demurred to one, and obtained judgment thereon, and pleaded to the other, and on trial of the issue there was a verdict for the plaintiff: the court held, that the plaintiff was entitled to costs upon his verdict, and the defendant to none upon his demurrer: for that the plaintiff having prevailed upon one of his counts, had a right to have his costs upon that count, without any deduction on account of the defendant's having got judgment upon his demurrer to the other count.ⁱ

But if there be two distinct causes of action in two separate counts, and as to one the defendant suffers judgment to go by default, and as to the other takes issue and obtains a verdict, he is entitled to judgment for his costs on the latter count, notwithstanding the plaintiff is entitled to judgment and costs on the first count.^k So, where the [*1009] declaration in *trespass* consisted of one count only, to which there were several pleas of justification, on which issues were taken, and a new assignment, on which judgment passed by default, and a *venire* was awarded, as well to assess the damages on the judgment by default, as to try the issues: all the issues being found for the defendant, it was holden that he was entitled to the costs of them.^l And in like manner, where one of the issues in a similar case was found for the defendant, he was holden to be entitled to the general costs of the trial, though another issue was found for the plaintiff.^m So where, in *trespass* for breaking and entering the plaintiff's close, the defendant pleaded a public right of way over the *locus in quo*, and the plaintiff took issue thereon, and new assigned the trespass *extra viam*, upon which the defendant suffered judgment to go by default; and at the trial, the jury found a verdict for the defendant on the right of way, and one shilling damages on the new assignment; the court held, that the defendant was entitled, on the issue found for him, to the general costs of the trial, and that the plaintiff

^f 5 East, 261. and see 1 Marsh. 235.

^g 5 East, 265.

^h *Id.* 264.

ⁱ 2 Bur. 1232. Say. Costs, 211. S. C. but differently reported. *Tamen quare*; and see stat. 8 & 9 W. III. c. 11. § 2.

^k 3 Durnf. & East, 654. and see 6 Durnf. & East, 602, 3. The same point was also ruled in another case, of *Wright clerk v.*

Smithies, T. 49 Geo. III. K. B. with this difference only; that the two distinct causes of action, which in the former case were stated in two counts, were in the latter comprised in one count. 13 East, 193. (b).

^l 8 Durnf. & East, 466. and see 5 East, 265.

^m 13 East, 191.

was entitled, on the new assignment, to no more costs than damages.^a But where the defendant, in trespass *quare clausum fregit*, pleaded not guilty, and also a justification under a right of way; and the plaintiff traversed the right of way, and new assigned *extra viam*; and issue was taken; as well on the new assignment as on the right of way; after verdict for the plaintiff, with one shilling damages on the new assignment, and for the defendant on the justification, the plaintiff was holden to be entitled to full costs, deducting only the defendant's costs on the issue found for him.^b So where, in trespass for cutting down trees, the defendant pleaded not guilty, and several pleas justifying cutting down the trees as a nuisance, for obstructing a highway; to which the plaintiff replied, joining issue on the plea of not guilty, and denying the highway, and new assigned cutting down the trees *extra viam*; and the defendant joined issue on the special pleas, and suffered judgment by default on the new assignment; the jury having found a verdict for the plaintiff on the general issue, and for the defendant on the issues on the special pleas, and assessed damages on the new assignment, it was holden, that the plaintiff was entitled to full costs, except upon the issues on the special *pleas, and that the defendant was not entitled to [*1010] costs, even on those issues.^c

The rules established by the foregoing cases, seem to amount to this: that where the plaintiff's demand is altogether denied by the defendant's pleas, and at the trial the plaintiff obtains a verdict for part of his demand, and the defendant obtains a verdict as to other part, the plaintiff is entitled to the costs of the issues found for him, which include the general costs of the trial, but do not include the costs of the issues found for the defendant, on which last mentioned issues, however, the defendant is not entitled to claim any costs from the plaintiff: But where the defendant suffers judgment by default, as to part of the plaintiff's demand, and pleads only as to other part, and the plaintiff takes issue on the pleas, and at the trial *all* the issues are found for the defendant, then the defendant is entitled to the costs of the issues found for him, and the plaintiff is entitled only to the costs of the judgment by default.^d And, accordingly, in an action of *trespass*, for trespasses charged in some named and some unnamed closes of the plaintiff, and also for taking his goods and chattels, where the defendant pleaded first, not guilty to the whole declaration; 2ndly, as to part, a special plea of licence; 3dly and 4thly, as to part, certain special pleas, on which the jury were, by consent, discharged from giving any verdict; and 5thly, as to the unnamed closes, *liberum tenementum*: The plaintiff, by his replication, took issue on the plea of not guilty; traversed the licence mentioned in the second plea, and also new assigned on that plea: and, as to the unnamed closes, entered a *nolle prosequi*: The defendant, by his rejoinder, took issue on the traverse, and suffered judgment by default on the new assignment; and the cause went to

^a 9 Price, 336.

-1012.

^b 1 East, 350. 13 East, 194. (a.) 1 Brod. & Bing. 222. 3 Moore, 555. S. C. but see id. 465. 11 East, 263. 1 Bing. 275. Post, S. C.

^c 1 Barn. & Cres. 278.

^d 3 Brod. & Bing. 119. 6 Moore, 330.

the assizes, as well to try the issues joined, as to assess the plaintiff's damages on the new assignment: At the trial, the jury found a verdict for the plaintiff on the general issue, (without assessing any damages thereon;) for the defendant on the plea of licence; and, on the new assignment, they assessed to the plaintiff one shilling damages, and one shilling costs: the court held, that the plaintiff was entitled to the general costs of the cause, including those of the trial, the costs of the issue found for the defendant being deducted, but no costs were allowed to the defendant on that issue.*

There was formerly a distinction, as to the costs on several counts, between the practice of the King's Bench and Common Pleas: In the former court, where the declaration consisted of several counts, [*1011] the plaintiff was only entitled to the costs of such as were found for him; and neither party was allowed the costs of those which were found for the defendant.^a But it was otherwise in the Common Pleas: for there, if the plaintiff succeeded upon any one of the counts, he was entitled to the costs of his whole declaration, though the defendant succeeded upon the others.^c This distinction however is now abolished; and it is settled in both courts, that neither party is entitled to costs on those counts which are found for the defendant:^d and there being several defendants, some of whom suffered judgment by default, makes no difference.^e In the Exchequer, when several issues have been directed, and some are found for the plaintiff, and others for the defendant, each party will be allowed costs on the issues found in his favour, and must pay them on those which are found against him.^f

An inclosure act directed, that the parties who were dissatisfied with the determination of the commissioners, might bring actions to try their rights, adding, "that if the verdict should be in favour of the commissioners' determination, the costs should be borne by the plaintiff, and if against such determination, then by the proprietors at large:" a proprietor brought an action, claiming *nine* distinct rights, and recovered for *three* only; and the court held, that he should only have his costs on those issues which were found for him, and that the defendant should have his costs of the other issues.^g But where, by an inclosure act, any person dissatisfied with the determination of the commissioners might bring an action against the person in whose favour such determination should have been made, and if it should appear that the party claiming was entitled to a qualified or less interest, the jury might declare the same on their verdict, to be indorsed on the *postea*, in addition to the verdict given on the issue joined, *but the costs of such action should abide and be determined by the verdict given upon the issue joined*; and an action was brought against the defendant who

* 6 Moore, 324. 3 Brod. & Bing. 117. S. C.

^a Say. Costs, 212. Doug. 677. 6 Durnf. & East, 602, 3. 5 East, 262, 3. 2 Bos. & Pul. 50. (b.) but see 1 Wils. 331.

^c Bul. N. Pri. 335. 2 Blac. Rep. 800. 1199. 6 Durnf. & East, 602, 3. 5 East, 262, 3. 2 Bos. & Pul. 49. but see the case

put by *Le Blanc*, J. 8 Durnf. & East, 467.

^d 2 Bos. & Pul. 334. 16 East, 129. 6 Taunt. 398. 2 Marsh. 201. S. C. 3 Brod. & Bing. 292. and see Chitty on Pleading, Chap. IV. p. 395.

^e 6 Taunt. 398. 2 Marsh. 201. S. C.

^f 2 Price, 272.

^g 6 Durnf. & East, 599.

claimed a right of common in respect of *ninety* acres, and upon the general issue, the declaration consisting only of one count, a verdict was given for the plaintiff as to *thirty* acres, and for the defendant as to the residue, and there was an indorsement on the *postea*, that the jury found the right of *common in respect to *sixty* acres, [*1012] &c.; the court held that the plaintiff was entitled to general costs.^a

It should be remembered, however, that the plaintiff has in no case a right to costs, except where he is entitled to judgment on the whole record: and therefore, where the defendant, in *trespass* for breaking and entering the plaintiff's free fishery in A., and also in B., and also in A. and B., pleaded first not guilty, and secondly, that the said free fisheries were parcel of a navigable harbour, &c. common to all the king's subjects, to which the plaintiff replied, prescribing for a free fishery in the said place, in right of his manor; and the defendant rejoined, taking issue on such prescription; it was holden, that on verdict for the plaintiff on the general issue, and for the defendant on the prescription, the latter going to the whole declaration, the plaintiff was not entitled to costs.^b So where, in *trespass* for breaking and entering the plaintiff's close covered with water, and fishing in his several and free fishery, the defendant pleaded the general issue of not guilty, and several special pleas of justification, on which the plaintiff new assigned, and the defendant pleaded thereto the general issue, and pleas of justification; and the jury found for the plaintiff on the general issues, with *one* shilling damages and *forty* shillings costs, and for the defendant on the pleas of justification, which covered the whole of the trespasses; the court of Common Pleas held, that the defendant was entitled to the general costs of the cause, on the issues which were found for him, and the plaintiff to costs on the other issues only.^c And where an executrix pleaded first *non assumpsit*, secondly, *ne unques executrix*, and thirdly, *plene administravit*; and issues on the two first pleas were found for the plaintiff, and on the last for the defendant; it was holden, that the last plea being a complete answer to the action, the defendant was entitled to the general costs of the trial.^d

It has already been observed,* that no costs were recoverable by a *defendant* at common law: And the reason seems to be, that if the plaintiff failed in his suit, he was amerced to the king *pro falso clamore*, which was thought to be a sufficient punishment, without subjecting him to the payment of costs. The first instance of costs being given to a defendant, was in a writ of right of *ward*, by the statute of *Marlberge*, (52 Hen. III.) c. 6. Afterwards, costs were given to the defendant in *error*, by the 3 Hen. VII. c. 10. and 19. Hen. VII. c. 20. and in *replevin*, by the 7 Hen. VIII. c. 4. and 21 *Hen. VIII. c. 19, &c. But in one of these cases, the defend-[*1013] ant is to be considered as an actor; and in the other of them, the provision is virtually for the benefit of the plaintiff in the original action.^e

^a 3 Maule & Sel. 323.

^b 11 East, 263, and *vide ante*, 711.

^c 4 Moore, 110. 1 Brod. & Bing. 465.
8. C. and see 1 Bing. 275. *accord*.

^d 1 Barn. & Ald. 254. 8 Taunt. 129.

^e *Ante*, 979.

^f Say. Costs, 70.

In *replevin*, when a defendant removes proceedings, by *recordari facias loquelam*, from a county court into one of the superior courts, and signs judgment of *non pros* in default of the plaintiff's appearing, he is entitled to costs:[†] And, by the 7 *Hen. VIII. c. 4. § 3.* and 21 *Hen. VIII. c. 19. § 3.* the defendant, in *replevin* or second deliverance, making avowry, cognizance, or justification, for rents, customs or services, or for damage feasant, is entitled to costs, if the avowry, cognizance, or justification be found for him, or the plaintiff be nonsuit, or otherwise barred; which statutes extend to avowries, &c. made by an *executor*,[‡] or for an *estray*,[‡] and, as it should seem, for an *amercement* by a court leet;[‡] but not to pleas of *prisel en auter lieu*, upon which the writ is abated,[‡] or to pleas of *property* in the thing distrained.[‡] By the 17 *Car. II. c. 7. § 2.* the defendant obtaining judgment thereon, for the arrearages of rent, or value of the goods distrained, is also entitled to his *full* costs of suit: And, by the 11 *Geo. II. c. 19. § 22.* if the plaintiff in an action of *replevin*, founded upon a *distress* for rent, relief, heriot, or other service, shall become nonsuit, discontinue his action, or have judgment against him, the defendant shall recover *double* costs of suit. But this latter statute does not extend to a distress for a rent charge,[‡] or seizure for a heriot *custom*.[‡] And where, by a canal act, the company were authorized to take certain lands for the purposes of the act, on making certain payments, either by annual rents or sums in gross, and the persons from whom the land was to be taken were empowered to distrain the goods of the company, even off the premises, in case of non-payment of such sums; an avowant, stating a distress under this act of parliament, was holden not to be entitled, on obtaining a verdict, to double costs, under the statute 11 *Geo. II. c. 19. § 22.*[‡] This statute gives double costs against a plaintiff in *replevin*; only in three cases; *viz.* where he is nonsuit, discontinues his action, or has judgment given against him: And therefore where, in *replevin*, the cause not being then at issue, the parties agreed by bond to submit the question to arbitration, the costs to abide the event, and the arbitrator afterwards awarded in favour of defendant; it was holden, that he was not entitled to double costs under the statute.[‡]

[‡] 1 Durnf. & East, 371. *Ante*, 421.

[‡] 2 Rol. Rep. 457.

[‡] Cro. Eliz. 330.

[‡] Cro. Jac. 520. but see Cro. Eliz. 330. 107.

[‡] *semb. contra.*

[‡] Com. Rep. 122. 2 Ld. Raym. 788. S. C.

[‡] Hardr. 153.

[‡] Willes, 429. 1 Bos. & Pul. 214. and see 1 New Rep. C. P. 56.‡

[‡] Barnes, 148. 2 Wils. 28. Say. Costs,

[‡] 7 Durnf. & East, 500. and see 1 Bos. & Pul. 213. S. P.

[‡] 1 Barn. & Ald. 670.

† Defendants in *replevin* who avowed generally under this statute, for rent due on a demise, under which the plaintiff held as their tenant, were held to be entitled to double costs upon a judgment in their favour, notwithstanding they pleaded many other avowries in various rights, from which circumstance it was suggested that they did not distrain as landlords, but with a view merely to try a title. 2 *Bing.* 341. *C. B.* 4 *Barn. & Cres.* 889. *K. B. accord.* 7 *Dowl. & Ry.* 484. *S. P.* And the expenses of successful searches for pedigree in such a case will also be allowed. *Id. ibid.* Where a tenant is aware of conflicting claims to the land he occupies, he ought to put the claimants to litigate the question, by filing a bill of interpleader. 2 *Bing.* 341.

‡ *Vide post*, p. 1079. *note*, as to the 23d section in regard to a rent charge.

By the statute 23 Hen. VIII. c. 15. § 1. it was enacted, that "in trespass upon the statute 5 Rich. II. stat. 1. c. 8. debt, covenant, detinue, account, trespass on the case, or upon any statute for an offence or wrong personal, immediately supposed to be done to the plaintiff, if the plaintiff, after the appearance of the defendant, be nonsuited, or a verdict pass against him, the defendant shall have judgment to recover his costs against the plaintiff, to be assessed and taxed by the discretion of the judge or judges of the court where such action shall be commenced or sued; and shall have such process and execution for the recovery of the same against the plaintiff, as the plaintiff should or might have had against the defendant, in case judgment had been given for the plaintiff."

Executors and administrators are not particularly excepted out of the statute 23 Hen. VIII. c. 15.; yet as that statute only relates to contracts made with, or wrongs done to the plaintiff,¹ it has been uniformly holden,² that they are not liable to costs, upon a nonsuit or verdict, where they necessarily sue in their representative character, and cannot bring the action in their own right; as upon a *contract* entered into with the testator or intestate,³ or for a *wrong* done in his life-time.⁴ So, where the plaintiff sued as executor, and was nonsuited upon evidence being given at the trial, that the supposed testator was still alive, the court refused to allow costs to the defendant; it appearing from affidavits on both sides, to be still at least doubtful whether the supposed testator was living or not.⁵ And where a plaintiff sued as executor, for a debt which appeared on the trial to be claimable, if at all, in the character of surviving partner of the deceased, and was nonsuited; the court refused to refer it to the master to tax the defendant's costs, it being doubtful whether justice would be done by such an order.⁶ But where the cause of action arises after the death of the testator or intestate, and the plaintiff may sue thereon in his own right, he shall not be excused from the payment of costs, though he bring the action as executor or administrator; as upon a *contract*,⁷ *express or implied, or in [¹⁰¹⁵] *trover*,⁸ for a conversion after the death of the testator or intestate. And where a declaration in *trover* by an executor consisted of two counts, one on a conversion in the life-time, and another after the death of the testator, for which latter the plaintiff might have declared in his own right, he was holden to be liable to costs on a

¹ 2 Str. 1107.

² Cro. Eliz. 503. Cro. Jac. 229. 2 Bulst. 261. 1 Salk. 207. 314. 3 Bur. 1586. Say. Costs, 97.

³ *Smith executor v. Rhodes*, T. 26 Geo. III. K. B.

⁴ T. Jon. 47. 1 Vent. 92. 2 Ld. Raym. 1414. 1 Str. 682. S. C. Cas. Pr. C. P. 167. Pr. Reg. 118. S. C. Barnes, 141. 1 H. Blac. 128. 1 Bos. & Pul. 445. 2 Bos. & Pul. 253. 2 East, 395. *Cook and others executors v. Lucas*, E. 42 Geo. III. cited in 2 East, 398.

⁵ Barnes, 129.

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⁶ 1 Barn. & Ald. 386.

⁷ 3 Barn. & Ald. 213. 1 Chit. Rep. 638. S. C.

⁸ 6 Mod. 91. 181. 1 Salk. 207. S. C. 1 Ld. Raym. 436. 1 Str. 682. Barnes, 119. 2 Str. 1106. 4 Durnf. & East, 277. 5 Durnf. & East, 234. 2 East, 396.

⁹ Com. Rep. 162. Cas. Pr. C. P. 61. Barnes, 132. Cas. temp. Hardw. 204. 7 Durnf. & East, 358. *Monkland v. De Grainge*, M. 41 Geo. III. K. B. 10 East, 293. 2 Taunt. 116. but see 3 Lev. 60. *asmb. contra*.

nonsuit.^c The reason why an executor, suing in his representative character, shall not be liable to costs, if he fail, is because he is supposed not to be cognizant of the contracts made by his testator; but as he must be cognizant of all contracts made by himself personally, though in his representative character, and as he might declare upon them in his own right, there is no reason why he should be exempt from costs, in case he fail in his action:^d And for a similar reason, executors or administrators are not necessarily exempted from costs, on interlocutory motions.^e But though an executor or administrator, necessarily suing as such upon a contract entered into with the testator or intestate, is not made liable to costs by the statute, and no costs can be awarded against him on record; yet in a late case, where the plaintiff sued as administrator, upon a contract made with his intestate, and assigned by the plaintiff to *J. S.* for whose benefit the action was brought, and it appeared in evidence that the contract had been annulled, with the privity both of the plaintiff and *J. S.* and the former was indemnified by the latter; a verdict being found for the defendant, the court of Common Pleas made a rule upon the plaintiff, to pay the defendant his costs, as for a contempt, in fraudulently abusing the process of the court.^f An executor or administrator is liable to costs, upon a judgment of *non pros*:^g And where he has *knowingly* brought a wrong action, or otherwise been guilty of a *wilful* default, he shall pay costs upon a discontinuance,^h or for not proceeding to trial according to notice:ⁱ but otherwise he is not liable to costs in either of these cases:^k nor where he merely sues [**1016*] *en auter droit*, is he liable to costs, upon a judgment as in case of a nonsuit.^l A plaintiff suing as *assignee* of an insolvent debtor, is not, by analogy to the case of executors and administrators, within the exemption of the statute 23 Hen. VIII. c. 15.; but if nonsuited, must pay the defendant's costs:^m Nor will the court suspend the payment of such costs, until the plaintiff has received sufficient assets, to be paid *quando acciderint*.ⁿ

Executors and administrators, when defendants, have no privilege with respect to costs:ⁿ And if there be a verdict against them, the judgment is, that the costs be levied of the goods of the testator or intestate, if the defendant hath so much thereof in his hands to be administered, and if not, *de bonis propriis*.^o A bankrupt, sued as executor, pleaded a false plea, and it being found against him, the plaintiff had judgment for the costs *de bonis propriis*, after which he

^c 2 Taunt. 116. and see 7 Durnf. & 217.

East, 358.

^d 6 East, 412. *per Lawrence, J.*

^e *Per Cur. M.* 42 Geo. III. K. B.

^f 3 Bos. & Pul. 115.

^g Cas. Pr. C. P. 14. 157, 8. 3 Bur. 1585.

^h 6 Durnf. & East, 654. 1 Chit. Rep. 628, 9. *in notis.*

ⁱ Cas. Pr. C. P. 79. 3 Bur. 1451. 1 Blac. Rep. 451. S. C. 2 New Rep. C. P. 72. 1 Chit. Rep. 629. *in notis. Ante*, 733.

^j Cas. Pr. C. P. 157, 8. Pr. Reg. 119. S. C. Barnes, 133. 3 Bur. 1585. 1 H. Blac.

^k 2 Str. 871. Barnes, 133. 4 Bur. 1927. Bay. Costs, 96, 7. S. C. *Per Cur. T.* 44

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Chit. Rep. 629. *in notis. Ante*, 819.

^l 4 Bur. 1928. *Per Cur. T.* 37 Geo. III. K. B. Barnes, 130. 2 H. Blac. 277. 2 East,

396. but see 7 Price, 709.

^m 8 Price, 212.

ⁿ Plowd. 183. Hut. 69. 79.

^o 4 Durnf. & East, 648. 7 Durnf. & East, 359.

obtained his certificate; and the court held, that this judgment for the costs was not discharged by the certificate.^p But when an executor or administrator pleads *plene administravit*, or judgments outstanding and *plene administravit præter*, and the plaintiff, admitting the truth of the plea, takes judgment of *assets in futuro*, the defendant is not liable to costs:^q nor does he seem to be liable thereto, when he pleads *plene administravit præter*, and the plaintiff, admitting the truth of the plea, takes judgment of the assets admitted in part, and for the residue of assets *in futuro*.^r And when an executor or administrator pleads several pleas to the whole declaration, as *non assumpsit* and *plene administravit*, and one of them is found for him, he is entitled to the *postea* and costs, though the other plea be found against him.^s But if the plaintiff take judgment of *assets in futuro*, upon the plea of *plene administravit*, and go to trial upon the plea of *non assumpsit*, he will be entitled to costs, if he obtain a *verdict; and therefore in [*1017] such case, unless the defendant has a good ground of defence upon *non assumpsit*, it is usual for him to move to withdraw his plea, which the court will permit him to do, upon payment of costs.^t So, where an executor pleaded *non assumpsit* and *plene administravit*, on which the plaintiff took issue, and a bond and mortgage outstanding, and *plene administravit præter*, on which latter plea the defendant took judgment of assets *quando acciderint*, and there was a verdict for the plaintiff on the plea of *non assumpsit*, and for the defendant on the issue of *plene administravit*; the court held, that the plaintiff, being at all events entitled to judgment of assets *quando*, and having been compelled by the defendant's pleading *non assumpsit*, to go down to trial, was entitled to retain the *postea*, and to have the general costs of the trial, though the issue of *plene administravit* was found against him.^u

There being still many cases, in which the defendant was not aided by the provisions of the before-mentioned statutes,^v it was enacted by the statute 4 Jac. I. c. 3. that "if any person shall commence in any court, any action of *trespass*, *ejectione firmæ*, or any other action whatsoever, wherein the plaintiff or demandant might have costs, in case judgment should be given for him, and the plaintiff or demandant shall be nonsuited therein, after the appearance of the defendant, or a verdict shall pass against him by lawful trial,

^p 3 Bur. 1368. 1 Blac. Rep. 400. S. C. *Ante*, 230.

^q *Bail v. Deschamps*, T. 34 Geo. III. C. P. after two arguments, and consulting with the judges of the King's Bench, whose practice had been to allow costs out of the future assets, and on looking into the precedents: and the judges of the King's Bench signified their intention not to allow them in future in that court. Imp. K. B. 9 Ed. 534. *in marg.* S. C. But, in the case of *De Tustet v. Andrade*, M. 58 Geo. III. K. B. 1 Chit. Rep. 629, 30. *in nota*, the court of King's Bench held, that though an administrator in such case

was not personally liable to pay costs, yet that judgment might well be entered for them, to be recovered *de bonis testatoris*, *quando acciderint*.

^r Rast. Ent. 323. 8 Co. 134. 2 Saund. 226. 1 Sid. 448. S. C.

^s *Garmans v. Heskelh*, E. 22 Geo. III. K. B. *Cockson v. Drinkwater*, T. 23 Geo. III. K. B. 1 Barn. & Ald. 254. 8 Taunt. 129. *Ante*, 1012.

^t 2 Blac. Rep. 1275.

^u 12 East, 232.

^v 2 Leon. 9. 3 Leon. 92. Bul. N. Pr. 334.

that then the defendant, in every such action, shall have judgment to recover his costs against the plaintiff or defendant, to be assessed and levied in like manner as upon the 23 *Hen. VIII. c. 15.*" By the above statute, the defendant is entitled to costs, on a nonsuit or verdict, in all cases where the plaintiff would have been entitled to them, if he had obtained judgment, as in *assumpsit*,⁷ &c. And though the declaration be insufficient, so that the plaintiff could not have had costs thereon, the defendant is nevertheless entitled to costs, for the unjust vexation:⁸ But this statute, being framed upon the model of the 23 *Hen. VIII. c. 15.* does not extend, any more than that, to actions brought by executors or administrators.⁹

The statutes which have been hitherto mentioned, as giving costs to defendants, only relate to cases where the plaintiff is nonsuited, or has a verdict against him. But there are other statutes, by which the defendant is entitled to costs upon a *nolle prosequi*, *non pros*, discontinuance, or demurrer; or when the plaintiff does not [*1018] recover *the amount of the sum for which the defendant was arrested, provided it appear that he had not any reasonable or probable cause for arresting him to that amount, and the court shall thereupon make a rule or order for the allowance of such costs.

By the 8 *Eliz. c. 2.* "upon process issuing out of the court of King's Bench, if the plaintiff do not declare in *three days* after bail put in; or if, after declaration, he do not prosecute his suit with effect, but willingly suffer the same to be delayed or discontinued, or he be nonsuited therein; the judges, by their discretions, shall award to the defendant his costs, damages and charges, in that behalf sustained." If the plaintiff enter a *nolle prosequi*, as to the whole cause of action, the defendant is entitled to costs upon this statute.¹⁰ And where, in *trespass* against two defendants, one of them suffered judgment by default, and a writ of enquiry was executed as against him, and the plaintiff entered a *nolle prosequi* as to the other, the court of Common Pleas held, that the latter was entitled to costs.¹¹ But where in *assumpsit*, against two defendants, one of them pleaded his bankruptcy, and the plaintiff entered a *nolle prosequi* as to him, and proceeded to trial, and obtained a verdict against the other defendant, who pleaded the general issue, the court of King's Bench held, that the former was not entitled to costs.¹² When a *nolle prosequi* is entered on any of the counts in a declaration, the plaintiff is not entitled to costs on such counts:¹³ And the statute 8 *Eliz.* does not extend, any more than the 23 *Hen. VIII. c. 15.* to actions brought by executors and administrators in their representative character.¹⁴

By the 13 *Car. II. stat. 2. c. 2. § 3.* it is enacted, that "upon an appearance entered for the defendant by attorney, of the term wherein the process is returnable, unless the plaintiff shall put into

⁷ *Ante*, 979.

⁸ Moor, 625. 1 Bulst. 189. 3 Bulst. 248. Hob. 219. Hut. 16. S. C. Cro. Car. 175. but see Cro. Jac. 158, 9. *scmb. contra.*

⁹ Gilb. C. P. 271.

¹⁰ 3 Durnf. & East, 511. and see 16 East,

129. *Ante*, 735.

¹¹ 8 Taunt. 643. 2 Moore, 718. S. C.

¹² *Harewood v. Matthews and another*, H. 56 Geo. III. K. B.

¹³ 16 East, 129. *Ante*, 735.

¹⁴ Cro. Eliz. 69. Cro. Jac. 361.

the court from whence the process issued, his bill or declaration against the defendant, in some personal action or ejectment of farm, before the end of the term next following after appearance, a nonsuit for want of a declaration may be entered against him; and the defendant shall have judgment to recover costs against the plaintiff, to be taxed and levied in like manner as upon the 23 Hen. VIII. c. 15." It has been observed, that the provision contained in the statute 8 Eliz. c. 2. with respect to the costs of a defendant, when the plaintiff in the King's Bench discontinues after declaration, *is [*1019] not extended by the 13 Car. II. to the case of a similar discontinuance in the Common Pleas.^s The reason generally assigned for this seeming omission is, that as a plaintiff could not discontinue his suit in the Common Pleas, without an application to the court for that purpose, it was customary to make the payment of costs to the defendant one of the conditions of compliance with a motion for leave to discontinue; and therefore it was unnecessary in such case, to make any provision by statute for the costs of a defendant.^b

And still further to discourage the bringing of frivolous and vexatious actions, it is enacted by the statute 8 & 9 W. III. c. 11. § 2. that "if any person shall commence or prosecute any action, in any court of record, wherein upon *demurrer*, either by plaintiff or defendant, demandant or tenant, judgment shall be given by the court against the plaintiff or demandant, the defendant or tenant shall have judgment to recover his costs, and have execution for the same by *capias ad satisfaciendum*, *fieri facias*, or *elegit*." This statute does not extend to demurrers to pleas in abatement;^c nor any action, wherein the defendant would not have been entitled to costs, upon a nonsuit or verdict.^{d†}

And for the more effectual prevention of frivolous and vexatious arrests and suits, it is enacted by the statute 43 Geo. III. c. 46. § 3. that "in all actions to be brought in *England* or *Ireland*, wherein the defendant or defendants shall be arrested and held to special bail, and wherein the plaintiff or plaintiffs shall not recover the amount of the sum for which the defendant or defendants in such actions shall have been so arrested and held to special bail, such defendant or defendants shall be entitled to costs of suit, to be taxed

^s Hal. Costs, 1 Ed. 138.

^b *Id. ibid.* and see 2 Crompt. 2 Ed. 462, 3. Say. Costs, 83.

^c 1 Ld. Raym. 337. 1 Salk. 194. 12

Mod. 195. Comb. 482. S. C. 2 Ld. Raym. 992. 1 Salk. 194. 6 Mod. 88. S. C.

^d Cas. Pr. C. P. 25. 1 H. Blac. 530. but see Cas. Pr. C. P. 4. *contra*.

† Where the defendants at the assizes, pleaded a plea *puis darrein continuance*, to which plaintiff having replied, defendants demurred to the replication, and obtained judgment on demurrer: Held, that they were entitled to the costs incurred since the plea *puis darrein continuance* only. 6 Dowl. & Ryk. 81. For the words of the statute of W. III. are, "if any person shall commence or prosecute," &c. and when that plea was pleaded, the plaintiff had his election either to submit or to proceed in the action: He elected to proceed, and put upon the record a replication, which was subsequently held to be bad in law. The subsequent costs, therefore, were incurred by his own act, and for those costs he is liable; but for those only, because he had good grounds for commencing, though not for prosecuting his action. *Per Bayley, J. Id.* 83.

that then the defendant, in every such action, shall have judgment to recover his costs against the plaintiff or demandant, to be assessed and levied in like manner as upon the 23 Hen. VIII. c. 15." By the above statute, the defendant is entitled to costs, on a nonsuit or verdict, in all cases where the plaintiff would have been entitled to them, if he had obtained judgment, as in *assumpsit*,⁷ &c. And though the declaration be insufficient, so that the plaintiff could not have had costs thereon, the defendant is nevertheless entitled to costs, for the unjust vexation:⁸ But this statute, being framed upon the model of the 23 Hen. VIII. c. 15. does not extend, any more than that, to actions brought by executors or administrators.⁹

The statutes which have been hitherto mentioned, as giving costs to defendants, only relate to cases where the plaintiff is nonsuited, or has a verdict against him. But there are other statutes, by which the defendant is entitled to costs upon a *nolle prosequi*, *non pros*, discontinuance, or demurrer; or when the plaintiff does not [*1018] recover *the amount of the sum for which the defendant was arrested, provided it appear that he had not any reasonable or probable cause for arresting him to that amount, and the court shall thereupon make a rule or order for the allowance of such costs.

By the 8 Eliz. c. 2. "upon process issuing out of the court of King's Bench, if the plaintiff do not declare in three days after bail put in; or if, after declaration, he do not prosecute his suit with effect, but willingly suffer the same to be delayed or discontinued, or he be nonsuited therein; the judges, by their discretions, shall award to the defendant his costs, damages and charges, in that behalf sustained." If the plaintiff enter a *nolle prosequi*, as to the whole cause of action, the defendant is entitled to costs upon this statute.^b And where, in *trespass* against two defendants, one of them suffered judgment by default, and a writ of enquiry was executed as against him, and the plaintiff entered a *nolle prosequi* as to the other, the court of Common Pleas held, that the latter was entitled to costs.^c But where in *assumpsit*, against two defendants, one of them pleaded his bankruptcy, and the plaintiff entered a *nolle prosequi* as to him, and proceeded to trial, and obtained a verdict against the other defendant, who pleaded the general issue, the court of King's Bench held, that the former was not entitled to costs.^d When a *nolle prosequi* is entered on any of the counts in a declaration, the plaintiff is not entitled to costs on such counts:^e And the statute 8 Eliz. does not extend, any more than the 23 Hen. VIII. c. 15. to actions brought by executors and administrators in their representative character.^f

By the 13 Car. II. stat. 2. c. 2. § 3. it is enacted, that "upon an appearance entered for the defendant by attorney, of the term wherein the process is returnable, unless the plaintiff shall put into

⁷ *Ante*, 979.

⁸ Moor, 625. 1 Bulst. 189. 3 Bulst. 248. Hob. 219. Hut. 16. S. C. Cro. Car. 175. but see Cro. Jac. 158, 9. *semb. contra*.

⁹ Gilb. C. P. 271.

^b 3 Durnf. & East, 511. and see 16 East,

129. *Ante*, 735.

^c 8 Taunt. 643. 2 Moore, 718. S. C.

^d *Harewood v. Matthews and another*, H. 56 Geo. III. K. B.

^e 16 East, 129. *Ante*, 735.

^f Cro. Eliz. 69. Cro. Jac. 361.

the court from whence the process issued, his bill or declaration against the defendant, in some personal action or ejectment of farm, before the end of the term next following after appearance, a nonsuit for want of a declaration may be entered against him; and the defendant shall have judgment to recover costs against the plaintiff, to be taxed and levied in like manner as upon the 23 *Hen. VIII. c. 15.*" It has been observed, that the provision contained in the statute 8 *Eliz. c. 2.* with respect to the costs of a defendant, when the plaintiff in the King's Bench discontinues after declaration, *is [*1019] not extended by the 13 *Car. II.* to the case of a similar discontinuance in the Common Pleas.^s The reason generally assigned for this seeming omission is, that as a plaintiff could not discontinue his suit in the Common Pleas, without an application to the court for that purpose, it was customary to make the payment of costs to the defendant one of the conditions of compliance with a motion for leave to discontinue; and therefore it was unnecessary in such case, to make any provision by statute for the costs of a defendant.^h

And still further to discourage the bringing of frivolous and vexatious actions, it is enacted by the statute 8 & 9 *W. III. c. 11. § 2.* that "if any person shall commence or prosecute any action, in any court of record, wherein upon *demurrer*, either by plaintiff or defendant, demandant or tenant, judgment shall be given by the court against the plaintiff or demandant, the defendant or tenant shall have judgment to recover his costs, and have execution for the same by *capias ad satisfaciendum, fieri facias, or elegit.*" This statute does not extend to demurrers to pleas in abatement;ⁱ nor any action, wherein the defendant would not have been entitled to costs, upon a nonsuit or verdict.[†]

And for the more effectual prevention of frivolous and vexatious arrests and suits, it is enacted by the statute 43 *Geo. III. c. 46. § 3.* that "in all actions to be brought in *England or Ireland*, wherein the defendant or defendants shall be arrested and held to special bail, and wherein the plaintiff or plaintiffs shall not recover the amount of the sum for which the defendant or defendants in such actions shall have been so arrested and held to special bail, such defendant or defendants shall be entitled to costs of suit, to be taxed

^s *Hul. Costs*, 1 Ed. 138.

Mod. 195. *Comb.* 482. *S. C.* 2 *Ld. Raym.*

^h *Id. ibid.* and see 2 *Crompt.* 2 Ed. 462,

992. 1 *Salk.* 194. 6 *Mod.* 88. *S. C.*

3. *Say. Costs*, 83.

ⁱ *Cas. Pr. C. P.* 25. 1 *H. Blac.* 530. but

[†] 1 *Ld. Raym.* 337. 1 *Salk.* 194. 12

see *Cas. Pr. C. P.* 4. *contra.*

† Where the defendants at the assizes, pleaded a plea *puis darrein continuance*, to which plaintiff having replied, defendants demurred to the replication, and obtained judgment on demurrer: Held, that they were entitled to the costs incurred since the plea *puis darrein continuance* only. 6 *Dowl. & Ryd.* 81. For the words of the statute of *W. III.* are, "if any person shall commence or prosecute," &c. and when that plea was pleaded, the plaintiff had his election either to submit or to proceed in the action. He elected to proceed, and put upon the record a replication, which was subsequently held to be bad in law. The subsequent costs, therefore, were incurred by his own act, and for those costs he is liable; but for those only, because he had good grounds for commencing, though not for prosecuting his action. *Per Bayley, J. Id.* 83.

according to the custom of the court in which such action shall have been brought; provided that it shall be made appear, to the satisfaction of the court in which such action is brought, upon motion to be made in court for that purpose, and upon hearing the parties by affidavit, that the plaintiff or plaintiffs in such action had not any reasonable or probable cause for causing the defendant or defendants to be arrested and held to special bail in such amount as aforesaid, and provided such court shall thereupon, by a rule or order of the same court, direct that such costs shall be allowed to the defendant or defendants: And the plaintiff or plaintiffs shall, upon such rule or order being made as aforesaid, be disabled from [*1020] taking out any execution for the sum recovered in any such action, unless the same shall exceed, and then in such sum only as the same shall exceed, the amount of the taxed costs of the defendant or defendants in such action; And in case the sum recovered in any such action shall be less than the amount of the costs of the defendant or defendants, to be taxed as aforesaid, that then the defendant or defendants shall be entitled, after deducting the sum of money recovered by the plaintiff or plaintiffs in such action, from the amount of his or their costs, so to be taxed as aforesaid, to take out execution for such costs, in like manner as a defendant or defendants may now by law have execution for costs in other cases."¹

Upon this statute, the defendant was allowed his costs, where the plaintiff arrested him for the price of coals, considered as full measure; the plaintiff having, previously to the arrest, compounded a penal action for delivering the same coals, as being short of measure.^m And where a verdict was taken at the trial for a nominal sum, subject to an order of reference for ascertaining the amount of the damages, by which the costs were directed to abide the event of the award, and the arbitrator found a less sum to be due to the plaintiff than that for which the defendant was arrested; the court held, that the sum so found, and for which judgment was afterwards given, was to be considered as a sum *recovered*, within the meaning of the act, so as to entitle the defendant to apply for costs.ⁿ So, where an attorney brought an action for his bill of costs, and held the defendant to bail for a larger sum than was afterwards found to be due upon taxation, without having any reasonable or probable cause for so doing, the court held, that this was a case within the statute; and that if not, still the court, in the exercise of its jurisdiction over its officers, would compel an attorney to pay costs under such circumstances.^o Executors, who have holden a party to bail, without reasonable or probable cause, for a debt due to their testator, are within the act.^p And where a plaintiff arrested a defendant, and held him to bail for 20*l.* knowing that the latter had a cross demand which would reduce the debt to 6*l.*, and upon the

¹ Append. Chap. XXXIX. § 31. And for the form of a *fiat facias* on this statute, see Append. Chap. XLI. § 39.

^m 2 Smith R. 261.

ⁿ *Neale v. Porter*, T. 44 Geo. III. K. B.

Burns v. Palmer, in *Seac.* M. 44 Geo. III. S. P. and see 1 Moore, 92. 5 Barn. & Ald. 663, 4. 1 Barn. & Cres. 101.

^o 5 Barn. & Ald. 661.

^p *Id.* 515. (a.)

trial, he recovered the latter sum only; the court of King's Bench held, that the defendant was entitled to his costs under the above statute, as having been arrested and held to *bail, without [*1021] any probable cause.[†] But, on the other hand, where the plaintiff had holden the defendant to bail, and a verdict was taken for him at the trial, subject to an order of reference for ascertaining the amount of the damages, and the arbitrator awarded a less sum than *fifteen* pounds; the court of Common Pleas, upon an application to allow the defendant his costs pursuant to the above statute, held that in order to entitle him to such costs, he must shew that the arrest was vexatious and malicious.[‡] So, if a defendant be arrested in that court for *fifteen* pounds, for goods sold, and be indebted to the plaintiff in the sum of *fourteen* pounds only, on a promissory note payable by instalments, the court will not allow the defendant his costs, pursuant to the above statute; as he might have been arrested on the note.[§] This statute does not extend to an action of *debt* on bond, where the plaintiff obtains a verdict for nominal damages, and takes his judgment for the penalty, exceeding the sum for which the defendant was arrested.^{||} And it has been holden not to apply to cases, where the defendant pays into court, upon the common rule, a less sum than he was arrested for, and the plaintiff takes it out of court:[¶] and it must be a strong case against an *executor*, to bring him within the meaning of the act.^{**} An application for costs under this statute, cannot be supported by a reference to the notes of the judge, before whom the cause was tried; but an affidavit must be made, shewing there was no reasonable or probable cause for the arrest.^{††} And the court will not make an order for costs to be paid to the defendant upon this statute, where it appears, on shewing cause, that under the circumstances, the plaintiff had a reasonable or probable cause for arresting the defendant, to the full amount of the sum for which he was arrested.^{‡‡} If a defendant's attorney apply for costs on this statute, without sufficient grounds, the court of Common Pleas, on discharging the rule, will make him pay the costs of the application.^{§§}

[†] 5 Barn. & Ald. 513. 1 Dowl. & Ryl. East, 90. 3 Moore, 327. 1 Brod. & Bing.
 67. S. C. and see 1 Barn. & Cres. 91. 66. S. C. 6 Price, 126. 2 Dowl. & Ryl.
[‡] 1 Moore, 92. and see 5 Price, 1. 3 266. but see 2 New Rep. C. P. 76. *contra*.
 Moore, 605. 1 Brod. & Bing. 278. S. C. * 1 Marsh. 21.
[§] 3 Moore, 590. * 1 Taunt. 60.
^{||} 10 East, 525. 7 Taunt. 251. 2 Marsh. * 1 Smith R. 521. and see 1 Moore, 92.
 527. S. C. 2 Chit. Rep. 147.
[¶] 1 Smith R. 428. 2 Smith R. 667. 13 * 4 Taunt. 191.

[†] So, where a defendant was arrested for a sum of money, in respect of the greater portion of which the plaintiff knew, at the time, that the defendant had obtained his discharge under the insolvent act, it was held, that the defendant was entitled to his costs under the same statute, as upon an arrest without probable cause. 7 Dowl. & Ryl. 369.

[‡] Where a defendant was arrested for a debt of 15*l.* and paid into court 6*l.* which the plaintiff took out and dropt the action: Held by the K. B. that although the defendant had offered to pay the 6*l.* before action brought, he was not entitled to have his costs taxed under the 43 Geo. III. c. 46. § 3. 4 Dowl. & Ryl. 186. See 5 Dowl. & Ryl. 383.

The plaintiff, we may remember, is not entitled to costs in a popular action, for the whole or part of the penalty given by statute to a common informer, unless they are expressly given him by the statute.^b Nor was the defendant entitled to costs in such an [*1022] action, *until the statute 18 *Eliz.* c. 5. § 3. (made perpetual by the 27 *Eliz.* c. 10.) by which it is enacted, that "if any *common informer* shall willingly delay his suit, or shall discontinue, or be nonsuit, or shall have the matter pass against him therein by verdict or judgment in law, the said informer shall pay to the defendant his costs, charges and damages, to be assigned by the court in which the suit shall be attempted:" with a *proviso*, that "this act shall not extend to any officer, who in respect of his office, has heretofore usually sued upon penal laws: nor to any officer, suing only for matters concerning his office."^c This act of parliament, which seems to give costs upon an arrest of judgment,^d extends to actions brought upon a *subsequent* statute,^e or one that is *repealed*;^f and also to actions *qui tam*, for *part* of a penalty, as well as where the *whole* is given to a common informer:^g But it does not extend to actions brought by the party grieved, upon a *remedial* statute.^h

When there are several defendants, who succeed in the action, the plaintiff may pay costs to which of them he pleases.ⁱ And if they fail, each of them is answerable for the whole costs: Thus, where an *ejectment* was brought against several defendants, who defended severally, and at the assizes one of them confessed lease entry and ouster, and had a verdict against him, but the others did not confess; the court upon application said, the officer must tax the same costs against all the defendants; and that if the plaintiff, after he had satisfaction against one, should take out execution against another, the latter might apply to the court.^k

When one of several defendants lets judgment go by default, and the other pleads a plea which goes to the whole declaration, and shews that the plaintiff had no cause of action, if this plea be found for the defendant who pleaded it, he shall have costs; and being an absolute bar, the other defendant shall have the benefit of it, and not pay costs to the plaintiff.^l But when the plea does not go to the whole but is merely in *discharge* of the party pleading it, [*1023] there the other *party shall not have the benefit of it; but shall pay costs, though it be found against the plaintiff.^m

Before the statute 8 & 9 W. III. c. 11. if one of several defend-

^b *Ante*, 980.

^c 2 *Ld. Raym.* 1333. *Bul. N. Pri.* 333.
4. And see the statute 24 Hen. VIII. c. 8. which exempts plaintiffs, suing to the use of the king, in any action whatsoever, from the payment of costs, in case they be nonsuited, or a verdict pass against them. See also 7 *Durnf. & East*, 367.

^d *Gilb. C. P.* 271. but see *Hul. Costs*, 203.

^e *Willes*, 392. 440. 1 *Wils.* 177.

^f *Hut.* 35, 6. 2 *Keb.* 106.

^g *Cowp.* 366. *Say. Costs*, 75. *S. C.* and see 2 *Str.* 1103. 6 *Vin. Abr.* 341, 2. *S. C.*

^h 1 *And.* 116. 2 *Leon.* 116. 4 *Leon.* 55. *Cro. Eliz.* 177. *Hut.* 22. 1 *Salk.* 30.

ⁱ 1 *Str.* 516. 2 *Str.* 1203.

^j *Bul. N. Pri.* 335, 6.

^k *Co. Lit.* 125. *Cro. Jac.* 134. 1 *Lev.* 63. 1 *Sid.* 76. 1 *Keb.* 284. *S. C.* 2 *Ld. Raym.* 1372. 1 *Str.* 610. 8 *Mod.* 217. *S. C. Cas.* *Pr. C. P.* 107. *Pr. Reg.* 102. *S. C.* 2 *H. Blac.* 28. 2 *Chit. Rep.* 153.

^l Same cases; 1 *Wils.* 89. 3 *Durnf. & East*, 656. 2 *Chit. Rep.* 153.

ants had been *acquitted*, he was not entitled to his costs; the courts construing the former acts to relate only to the case of a total acquittal of all the defendants.^a This being found inconvenient, it was enacted by the above statute, § 1. that "where several persons shall be made defendants to any action of trespass, assault, false imprisonment, or *ejectione firmæ*, and any one or more of them shall be, upon the trial thereof, acquitted by verdict, every person so acquitted shall recover his costs of suit, in like manner as if the verdict had been given against the plaintiff, and acquitted all the defendants; unless the judge, before whom the cause is tried, shall immediately after the trial thereof, in open court, certify upon the record under his hand, that there was a reasonable cause for making such person a defendant." This statute is confined to the particular actions mentioned therein; and does not extend to an action of trespass upon the *case*,^b nor consequently to an action of *trover*:^c neither does it extend to an action of *replevin*,^d nor to an action of *debt* on bond against executors, one of whom is acquitted on the plea of *plene administravit præter*.^e On a joint plea of not guilty to *trespass* and *assault*, if one defendant be found guilty, with one shilling damages and one shilling costs, and the other acquitted, the latter is only entitled to forty shillings costs.^f

When a *feigned* issue is ordered by a court of *law*, whether it be in a civil or criminal proceeding, the costs always follow the verdict, and must be paid to the party obtaining it.^g But when a feigned issue is ordered by a court of *equity*, the costs do not follow the verdict, as a matter of course; but the finding of the jury is returned back to the court which ordered the issue, and the costs there are in the discretion of the court.^h When the issue is ordered by a court of *law*, on a rule for an information,ⁱ or motion for an attach- [*1024] ment,^j the costs of the original rule or motion do not in general follow the verdict, but only the costs of the feigned issue; which costs are to be reckoned from the time when the feigned issue was first ordered and agreed to.^k Yet, where it was ordered by the consent rule, that the costs should abide the event of the issue, the court directed the *whole* costs to be paid under it.^l

Having thus shewn, in what cases the parties are entitled to costs, I shall proceed to consider, what costs they are respectively entitled

^a 2 Str. 1005. and see 1 Salk. 194.

^b 2 Str. 1005.

^c Barnes, 139.

^d 3 Bur. 1284. 1 Blac. Rep. 355. Say. Costs, 215. S. C.

^e *Duke of Norfolk v. Anthony and another*, E. 42 Geo. III. K. B.

^f 2 Maule & Sel. 172. and see 4 Barn. & Ald. 43. 700.

^g *Still and Rogers*, 1 Lil. Pr. 344. *per Holt*, Ch. J. Barnes, 130. 1 Wils. 261. 331. Say. Rep. 24. 1 Wils. 324. S. C. and see Burt. Prac. Excheq. 248, 9. Peake's Cas. N. Pri. 69. 204. 7 Taunt. 31. 2 Marsh. 355. S. C. But, in the case of *Hoskins v.*

Ld. Berkeley, (4 Durnf. & East, 402.) the court strongly intimated an opinion, that as feigned issues were only granted with the leave of the court, it would be prudent in future, when they permitted such issues to be tried, to compel the parties to consent, that the costs should be in the discretion of the court.

^h Say. Rep. 229. 1 Bun. 608. Say. Costs, 144. S. C.

ⁱ Say. Rep. 253.

^j 1 Bur. 604.

^k 2 Bur. 1021. and see 3 Maule & Sel. 323.

to; with the means of taxing and recovering them, as between *party* and *party*.

When the *plaintiff* recovers *single* damages, he is only entitled to *single* costs, unless more be expressly given him by statute: And *single* damages only are recoverable in an action against a tenant, to recover the value of *three* years improved rent of the premises, for secreting an ejectment, on the statute 11 Geo. II. c. 19. § 12.^a But if *double* or *treble* damages are given by a statute, subsequent to the statute of *Gloucester*, in a case wherein *single* damages were before recoverable, the plaintiff is entitled to *double* or *treble* costs, although the statute be silent respecting them;^b as in an action upon the 2 Hen. IV. c. 11.^c &c. So, *treble* costs are recoverable by the plaintiff, in an action on the case for *treble* damages, against the sheriff, on the statute 29 Eliz. c. 4. for extortion.^d But the avowant in *replevin*, on a distress for poor rates, is only entitled to *single* costs, under the statute 43 Eliz. c. 2. § 19.^e And where, on a declaration in *trespass*, consisting of six counts, two of which were for a forcible entry on the statute 8 Hen. VI. c. 9. § 6, and the rest at common law, judgment having gone by default, the plaintiff obtained general damages on a writ of inquiry, and sixpence costs; the court held, that he was not entitled to *treble* costs on all the counts of the declaration, but could only enter his judgment on the counts at common law, with *single* costs.^f In some cases, *double* or *treble* costs are expressly given to the *plaintiff*; as upon the game laws, by the statute 2 Geo. III. c. 19. § 5.: And whenever a plaintiff is [*1025] entitled to *double* or *treble* costs, the costs given by the court *de incremento* are to be doubled or trebled, as well as those given by the jury.^g But double or treble costs are not to be understood to mean, according to their literal import, twice or thrice the amount of single costs. When a statute gives *double* costs, they are calculated thus: 1. the common costs; and then *half* the common costs: If *treble* costs, 1. the common costs; 2. half of these; and then half of the latter.^h

Double or treble costs are also in some cases expressly given to the *defendant*; as, in actions against justices of the peace, constables, &c. by the 7 Jac. I. c. 5.ⁱ (made perpetual by the 21 Jac. I. c. 12.

^a 2 Barn. & Ald. 662 (a).

^b Say. Costs, 228. and see Hul. Costs, 19. 475, &c.

^c *Ante*, 925. 979.

^d 2 Barn. & Ald. 393. 1 Chit. Rep. 137. S. C. And for the judgment in this case, see Append. Chap. XXIII. § 86.

^e 4 Moore, 296. 1 Brod. & Bing. 517. S. C. and see the case of *Hempson v. Josselyn, & others*, 4 Moore, 297. (b).

^f 2 Moore, 238. *Ante*, 925.

^g 2 Leon. 52. Cro. Eliz. 582. 3 Lev. 351. Carth. 297. 321. 1 Salk. 205. 1 Ld. Raym.

19. S. C. 2 Str. 1048. but see 1 Durnf. & East, 252.

^h Table of Costs, in *principio*. 1 Chit. Rep. 137. (a).

ⁱ This statute does not extend to actions for a mere *non-feasance*, but only where something is *done* by the officers. 2 Lev. 250. 3 East, 92. And accordingly, parish officers, or persons acting on their behalf, are not entitled under this statute to double costs, upon a judgment as in case of a nonsuit, in an action brought against them, for the price of

† The true mode of estimating the amount of double costs is first, to allow the defendant the single costs, including the expenses of witnesses, counsels' fees, &c. and then to allow him one half of the amount of the single costs, without making any deduction on account of counsel's or court fees, &c. 4 Barn. & Cres. 889.

§ 2.); for distresses for rents and services, by the 11 *Geo. II. c. 19. § 21, 2.*;^k where the plaintiff recovers less than 40s. damages, by the 23 *Geo. II. c. 33. § 19.*;^l on the building act, 14 *Geo. III. c. 78. § 100.*;^m against officers of the excise or customs, by the 23 *Geo. III. c. 70. § 34. 24 Geo. III. sess. 2. c. 47. § 35. 39. and 28 Geo. III. c. 37. § 23.*; against persons holding public employments, &c. and having power to commit to safe custody, by the 42 *Geo. III. c. 85. § 6.*; against any person or persons, for any thing done in pursuance of the act for consolidating the provisions of the acts relating to the duties under the management of the commissioners for the affairs of taxes, or any act for granting duties to be assessed under the regulations of that act;ⁿ or in actions on the mutiny act,^o or for non-residence.^p And, by the statute 1 *Geo. IV. c. 87. § 6.* "in all cases wherein the landlord shall elect to proceed in *ejectment*, under the provisions of that act, and the tenant shall have found bail, as ordered by the court, if the landlord upon the trial of the cause shall be nonsuited, or a verdict pass against him upon the merits of the case, there shall be judgment against him, with *double costs.*"[†]

*In the foregoing and similar cases, where it does not [*1026] appear, on the face of the record, that the defendant is entitled to the benefit of the act, (as where he pleads the general issue,) and there is no particular mode appointed for recovery of the costs, the proper mode, after a nonsuit or verdict for the defendant, is to apply to the court, upon an affidavit of the facts, for leave to enter a suggestion on the roll;^a which suggestion should be entered before the entry of final judgment:^b And it cannot be done by rule of court,^c unless where the plaintiff moves for leave to discontinue, on payment of costs; in which case, the court may make it part of the rule, that he shall pay double or treble costs.^d But when the facts entitling the plaintiff to double or treble costs, appear on the face of the record by pleading, or on a special verdict,^e &c. a suggestion is unnecessary: And if a particular mode be appointed by statute, for the recovery of double or treble costs, as by the *certificate* of the judge who tried the cause, on the 7 *Jac. I. c. 5.* there that particular mode must be observed:^f so that if the judge certify, there is no

goods sold and delivered to them for the use of the poor. 3 *Maule & Sel. 131.*

^k This statute does not extend to a distress for a rent charge, or *seizure* for a heriot custom. *Ante*, 1013.

^l 4 *Maule & Sel. 171.*

^m 9 *East*, 322.

ⁿ 43 *Geo. III. c. 99. § 70.*

^o 5 *Taunt. 820. 1 Marsh. 382. S. C. 3 Maule & Sel. 591. and see stat. 3 Geo. IV. c. 13. § 149.*

^p 57 *Geo. III. c. 99. § 45.*

^a 1 *Str. 49, 50. Cas. Pr. C. P. 16. Cas. temp. Hardw. 126. Id. 138. 2 Str. 1021. S. C. Say. Rep. 214. 3 Wils. 442. 9 East, 322. Append. Chap. XXXIX. § 25. 28, 9, 30.*

^b 5 *Taunt. 820. 1 Marsh. 382. S. C. 3 Maule & Sel. 591.*

^c 1 *Str. 50.*

^d 2 *Str. 974. Cas. temp. Hardw. 125.*

^e *Doug. 308. (n.)*

^f 2 *Vent. 45. Doug. 307, 8. 7 Durnf. & East, 448. but see Doug. 308. n.*

† Under the Birmingham paving act, 52 *G. III. c. 113.* some of several defendants in whose favour a verdict has been given, are entitled to treble costs, though the verdict may have gone against others. 2 *Bing. 267.*

need of a suggestion; and if he do not, it is of no avail, except where judgment goes by default.⁷ When a defendant is entitled to treble costs, under a statute, by a judge's certificate, and judgment is entered up for treble costs *generally*, without stating on what ground the defendant is entitled to them, this is a substantial defect; and the court of Common Pleas would not amend the judgment, by striking out the word "*treble*."⁸ But the court of King's Bench, in the same case, allowed an amendment to be made on the record, by inserting the certificate of the judge who tried the cause, allowing the plaintiff treble costs, which had been omitted by the clerk in entering judgment in the Common Pleas.⁹

Costs are taxed by the master, in the King's Bench and Exchequer, or prothonotaries in the Common Pleas, upon a bill made out by the attorney for the prevailing party; or more frequently without a bill, upon a view of the proceedings; and if there have been any *extra* expenses, which do not appear on the face of the proceedings, there should be an affidavit made of such expenses, to warrant the allowance of them; which is called an affidavit of in- [*1027] creased costs.¹⁰ In country *causes*, such an affidavit is generally made; and if sworn before a commissioner, it must be filed with the clerk of the rules in the King's Bench, or secondaries in the Common Pleas: and, in the former court, the clerk of the rules makes a copy of it for the master; but in the latter court, it is usual for the secondaries, on being paid for a copy, to mark the affidavit, and permit the original to be taken to the prothonotaries, who keep it till the costs are taxed, and then send it to the secondaries to be filed. It is also usual to give notice to the opposite attorney, of the time when the costs are intended to be taxed; but in order to enforce it, there must be a side-bar rule to be present at taxing costs:¹¹ which rule is obtained from the clerk of the rules in the King's Bench, or secondaries in the Common Pleas, and a copy of it should be duly served; after which, if the costs are taxed without notice, the taxation is irregular, and the attorney liable to an attachment. If either party be dissatisfied with the allowance of costs, he may apply to the court, for a rule to shew cause why the master or prothonotaries should not review their taxation:¹² And where an attorney had charged for a declaration as containing more *folios* than it really contained, and this charge was allowed by the master, the court of King's Bench held it to be a good ground for reviewing the taxation:¹³ But the affidavit, in support of the rule, must be confined to the objections alleged against the taxation, and not enter into the merits of the cause.¹⁴ And where an attorney's

⁷ Cas. temp. Hardw. 138, 9.

⁸ 5 Taunt. 820. 1 Marsh. 382. S. C.

⁹ 3 Maule & Sel. 591.

¹⁰ Append. Chap. XL. § 7.

¹¹ Append. Chap. XL. § 5, 6.

¹² 5 Taunt. 660.

¹³ 1 Chit. Rep. 544.

¹⁴ *Id.* 321.

† In an action on the case for disturbance in the enjoyment of a water course, the court confirmed the prothonotary in allowing the expense of such plans as had been used for the information of the court. 2 Bing. 75. C. B. So, in replevin to try title, expenses of successful searches for pedigree were allowed. *Id.* 341.

clerk admitted, on the taxation of costs before the master, that the suit in which the costs were taxed, was conducted by his employer from motives of charity, on behalf of the plaintiff, the court of King's Bench held, that the clerk was such an agent as to bind his master by such admission.⁵ But the court of Exchequer would not interfere with the province of the master, in the taxation of costs *de incremento*, by ordering a new taxation in favour of a defendant, on the ground that the plaintiff had been himself the cause of increasing the amount of costs, by proceeding to trial, after an offer by the defendant to give a *cognovit*.⁶

The means of recovering costs, as between party and party, are by *execution* or *action*, upon a judgment obtained for them; or by *attachment*, upon a rule of court.¹ Thus in *ejectment*, when there is a verdict and judgment against the tenant, execution may be taken out, or an action brought thereon, for the costs;² but when the plaintiff is nonsuited, for the defendant's not confess- [*1028] ing lease entry and ouster, the lessor of the plaintiff must proceed by attachment, upon the consent rule.¹ And so, where the nominal plaintiff is nonsuited upon the merits, or has a verdict and judgment against him, the only remedy is by attachment, against the lessor of the plaintiff.³ Where the lessor of the plaintiff in *ejectment*, having entered into the consent rule to pay costs, died between the commission day and the trial, and the plaintiff was nonsuited upon the merits, the court held that his executor was not liable to pay the costs.⁴

In proceeding by *attachment*, a copy of the rule, with the officer's *allocatur* thereon, should be *personally*⁵ served on the party liable to the payment of costs; and at the same time the original rule should be shewn to him,⁶ and a demand of payment made:⁷ And when the costs are ordered to be paid to the attorney, the demand may be by the acting attorney in the cause, although he act in the name of another attorney.⁸ If the costs be not paid, the court, upon an affidavit of the circumstances,⁹ will grant an attachment;¹⁰ the rule for which is absolute in the first instance,¹¹ and may be moved for on the last day of term.¹² In the Exchequer, the defendant, after a personal demand and refusal, may proceed against the plaintiff by *subpœna* and attachment, for non-payment of costs on a *non pros*, or for not proceeding to trial,¹³ or in *ejectment* on a nonsuit,¹⁴ &c.

To assist the parties in the recovery of costs, and do justice

⁵ Dowl. & Ry. *Ni. Pri.* 48. 3 Stark. K. B. *per Cur.*
Ni. Pri. 185. S. C.

⁶ 9 Price, 344. ¹² H. Blac. 248.

⁷ Run. Eject. 2 Ed. 463, 4.

⁸ Run. Eject. 2 Ed. 464, 5. 1 Salk. 259.
Barnes, 182. Ad. Eject. 2 Ed. 296. Append. Chap. XLVI. § 41.

⁹ Run. Eject. 2 Ed. 465, 6. *Tilly and Bailey*, M. 6 Geo. II. 3 Taunt. 485.

¹⁰ 1 Barn. & Cres. 284. 2 Dowl. & Ry. 437. S. C.

¹¹ 3 Durnf. & East, 351. *Pope v. Smith*,

¹² *Id. ibid.*

¹³ *Hubbard v. Horton*, H. 36. Geo. III.

K. B.

¹⁴ Say. Rep. 95.

¹⁵ Append. Chap. XL. § 8.

¹⁶ Append. Chap. XL. § 9, 10.

¹⁷ *Per Buller*, J. M. 24 Geo. III. K. B. 1 Bos. & Pul. 477. *Ante*, 486a, 7a.

¹⁸ 5 Bur. 2686.

¹⁹ Append. Chap. XL. § 11, 12, 13, 14.

²⁰ Append. Chap. XLVI. § 42, 3.

between them, they are allowed to deduct or set off the costs, or debt and costs, in one action, against those in another. This practice however agreeable to natural justice, does not seem to have formerly obtained in the court of King's Bench:† But in the Common Pleas, it has been frequently allowed; and that, not only where the parties have been the *same*,^b but also where they have been in some measure *different*. Thus, a party has been permitted [*1029] to set off a *separate* demand, for costs payable to himself alone, against a *joint* demand, for costs payable by himself and others:^c and he has also been permitted to set off a *joint* demand, for costs payable to himself and another, against a *separate* demand, for damages and costs payable by himself only.^d But the court on motion will not enable a prisoner to set off, in a summary way, a debt for which he has obtained no judgment, against the plaintiff's execution:^e And where, in an action of *trespass* against four defendants, the plaintiff obtained a verdict against one, and the other three were acquitted, the court would not suffer the costs of the three defendants, who were acquitted, to be deducted out of the plaintiff's costs, against that defendant who was found guilty; declaring the motion to be unprecedented.^f So, a judgment recovered by A. against B. and C. cannot be set off, on application to the general jurisdiction of the court, against another judgment recovered against A. by the assignees of B. under an insolvent debtor's act; the interest of third persons intervening, who have peculiar claims by the statute.^g† In the King's Bench, we have seen,^h the court will not in general suffer the debt and costs in one action to be set off against those in another, until the attorney's bill be first discharged; but in the Common Pleas, the attorney's lien for his costs, is holden to be subject to the equitable claims that exist between the parties in the cause.ⁱ When the application is made by

* 2 Str. 891. 1203. Bul. N. Pri. 336. 4 Durnf. & East. 124. 8 Durnf. & East. 69.

^b Barnes, 145. 2 Blac. Rep. 826. 869. 3 Wils. 396. Say. Costs, 256. S. C. Bul. N. Pri. 336. 2 H. Blac. 440. 587. 2 Bos. & Pul. 28. 4 Taunt. 634. but see 1 New Rep. C. P. 311.

^c Barnes, 146. but see *id.* 130.

^d Say. Costs, 254. 2 Blac. Rep. 827. S. C. cited. *Cawthorne v. Thompson* and another, T. 24 Geo. III. K. B. S. P. and

see 1 H. Blac. 217. 657. 2 H. Blac. 587.

^e 6 Taunt. 176.

^f Barnes, 145. Bul. N. Pri. 336. 4 Barn. & Ald. 43. 700. but see 1 H. Blac. 23. 217. 657. 2 H. Blac. 587.

^g 3 East, 149.

^h *Ante*, 102.

ⁱ *Id. ibid.* and see Lee's Prac. Dic. 1 V. p. 108, 9. 340, 41. 4 Taunt. 632. 1 Dowl. & Ryl. 168.

† But in a recent case, that court determined that the costs of a bill in chancery, dismissed in favor of the defendant, may be set off against the plaintiff's costs of a suit for the same cause of action, subject however to the attorney's general lien. 4 Dowl. & Ryl. 363. that is, the *usual* lien of an attorney, which does not extend beyond the costs of the immediate suit. 5 Dowl. & Ryl. 399, 401.

‡ The costs of judgment as in case of a nonsuit, entered up against a plaintiff, after he has become bankrupt, cannot be set off against the costs of an action by the bankrupt's assignees against the same defendant for the same cause of action. For whether the costs of the nonsuit were or were not provable under the bankrupt's commission, there was no mutual credit between the defendant and the bankrupt's assignees, nor were the parties in the two actions, the same. 2 Bingh. 453. C. B.

the party to whom the *larger* sum is due, the rule is for a stay of proceedings, on acknowledging satisfaction for the *less* sum:² but where the less sum is due to the party applying, the rule is to have it deducted, and for a stay of proceedings, on payment of the balance.¹

² Bul. N. Pri. 336. 8 Durnf. & East, Say. Costs, 254. and see 4 Durnf. & East, 69. 1 Taunt. 426. 1 Maule & Sel. 696. 124.

¹ 2 Blac. Rep. 869. 3 Wils. 396. S. C.

CHAP. XLI.

OF EXECUTION BY FIERI FACIAS, CAPIAS AD SATISFACIENDUM, AND ELEGIT; AND IN REPLEVIN, AND EJECTMENT.

EXECUTION, in civil actions, is the mode of obtaining the debt or damages, or other thing recovered by the judgment:^a and it is either for the *plaintiff* or *defendant*. For the former, upon a judgment in *debt*, the execution is for the debt and damages, or, in *assumpsit*, *covenant*, *case*, *replevin*, or *trespass*, for the damages and costs; to be levied, in an action against an *executor* or *administrator*, of the goods of the testator or intestate, in the hands of the defendant, if he hath so much thereof in his hands to be administered, and if not, then the damages or costs to be levied *de bonis propriis*.^b Upon a judgment in *detinue*, the execution is for the goods, or their value, with damages and costs; and in *ejectment*, for the plaintiff to have possession of his term in the tenements recovered, with or without damages or costs. For the *defendant*, upon a judgment in *replevin*, the execution at common law is for a return of the goods;^c or, upon the statute 17 *Car.* II. c. 7. for the arrearages of rent, and costs:^d and in other actions, upon a judgment of *non pros*, nonsuit, or verdict, it is for the costs only.

In the present chapter, it is proposed to consider the ordinary modes of execution for the debt or damages and costs, in *debt* or *assumpsit*, &c. by *fieri facias*, against the goods and chattels of the party against whom the judgment is given; by *capias ad satisfaciendum*, against his person; or by *elegit*, against his goods and a moiety of his lands: for a return of the goods in *replevin*, by *retorno habendo*; and for the recovery of the possession of the term in *ejectment*, by *habere facias possessionem*.

At common law, when a subject sued execution upon a judgment for debt or damages, he could not have the body of the defendant or his land in execution, unless it were in special cases; but could have [*1331] execution only of his goods and chattels, and of his corn and other present profits of his land: for which purpose the law gave him two several writs, to be sued within the year, one called a *fieri*

^a Bac. Abr. tit. *Execution*, A. Com. Dig. pend. Chap. XLI. § 8. 16.
tit. *Execution*, A. 1.

^c Append. Chap. XLV. § 76, &c.

^b Cro. Eliz. 887. Dyer, 185. (b). Ap- ^d Id. § 73, 4, 5.

facias, which was only of the goods and chattels, the other a *levari facias*, whereby the sheriff was commanded, that of the lands and chattels of the defendant, he should cause to be levied, &c.^e The *capias ad satisfaciendum* lay at common law, in actions of trespass *vi et armis* only; but has since been given in other actions, by a variety of statutes.^f The writ of *elegit* was given by the statute of *Westm.* 2. (13 Edw. I.) c. 18: And by this statute, he who recovereth a debt or damages, may have a writ of execution, for levying them of the lands and chattels; or that the sheriff shall deliver to him all the chattels of the debtor, saving only his oxen and beasts of his plough, and one half of his land, until the debt be levied by a reasonable price or extent. In *replevin*, the *retorno habendo* is the common law writ of execution, for obtaining a return of the goods distrained, on a judgment for the *defendant*: And in *ejectment*, it seems that the execution for the *plaintiff* at common law, was only for damages and costs; the writ of possession not being introduced until about the reign of *Henry* the seventh.^g

After final judgment *signed*, and even before it is *entered* of record,^h the plaintiff may in general, at any time within a year and a day, and whilst the parties to the judgment continue the same, take out execution by *fieri facias*, *capias ad satisfaciendum*, or *elegit*, &c. provided there be no writ of error depending, or agreement to the contrary:ⁱ and execution may be sued out, in the Common Pleas, by a different attorney from the attorney in the cause, without obtaining an order for changing the attorney.^k If the plaintiff be apprehensive of a writ of error, he may immediately sue out execution, without waiting to have his costs taxed;^l which is sometimes done when the debt is large: and so, if the plaintiff, after obtaining a verdict in *ejectment*, sue out a writ of *habere facias possessionem*, without waiting to tax his costs, the defendant's writ of error will not operate as a *supersedeas*.^m But after a year and a day from the time of signing judgment, the plaintiff cannot regularly take out execution, without reviving the judgment by *scire facias*, unless a *fieri facias* or *capias ad satisfaciendum*, &c. was previously sued out, returned *and filed, or he was hindered from suing it out by [*1032] a writ of error,ⁿ &c.: And if a writ of error be brought, it is generally speaking a *supersedeas* of execution from the time of its allowance, provided bail, when necessary, be put in and perfected in due time.^o After a writ of error allowed, the plaintiff brought an action on the judgment, wherein bail was justified: afterwards, the writ of error was non-prossed, for want of transcribing the record, and the plaintiff, without discontinuing his action on the judgment, took the defendant's goods in execution, which was deemed irregular; and the court of Common Pleas set aside the execution, and ordered the

^e 2 Inst. 394, 5. and see 3 Salk. 286.

607, 8.

^f Hob. 56. *Ante*, 145.

^h 2 Bos. & Pul. 357. *Ante*, *108.

^g Run. Eject. 2 Ed. 14, 15. Ad. Eject. 2 Ed. 10, 11.

ⁱ 5 East, 146, 7. and see 4 Taunt. 289.

^k 4 Taunt. 289. and see Barnes, 212, 13.

^l Gilb. C. P. 24. Law of Executions, 43. Bul. Ni. Pri. 228.

^m 2 Moore, 581.

ⁿ *Post*, Chap. XLIII.

^o *Post*, Chap. XLIV.

goods to be restored, with costs; but held, that the plaintiff would be at liberty to take out execution, after discontinuing his action on the judgment.^p

Writs of execution are *judicial* writs, issuing out of the court where the record is, upon which they are grounded:^q and therefore, when a record is removed into the King's Bench, from the Common Pleas, or an inferior court, by writ of error, and the judgment affirmed,^r or plaintiff in error non-prossed,^s or when judgment is affirmed in the Exchequer Chamber,^t or House of Lords,^u to which a transcript only is removed, the execution issues out of the court of King's Bench. So, if proceedings are removed out of the county court, or other court not of record, by writ of false judgment, and the plaintiff is non-prossed, the execution shall issue out of the court above:^v but in the latter case, a *scire facias* seems to be necessary:^w And, in like manner, we have seen,^x the execution issues out of the superior court, when the record or transcript of the proceedings is removed from the courts in *Wales*, or the counties palatine, or from an inferior court, by *certiorari*, under the statute 19 Geo. III. c. 70. or 33 Geo. III. c. 68.

The party suing out execution for the debt or damages and costs recovered, or the costs only, may, at his election, have a *feri facias* against the goods, a *capias ad satisfaciendum* against the person, or an *elegit* against the goods and moiety of the lands, of the party chargeable:^a And a *feri facias* and *capias ad satisfaciendum* may issue at the same time, against the goods and person of a defendant.^b So the party, having sued out one writ of execution, may, before it is executed, abandon that writ, and sue out another of a *different* [*1033] sort; or he may have several writs of the *same* sort, running at the same time, in order to take the defendant, or his goods, &c. in different counties: And where, in an action against two defendants, the plaintiff sued out two several writs of *testatum feri facias*, at the same time into different counties, and the sheriff under each of them took possession of the goods of one of the defendants; it appearing that the plaintiff's object was merely to obtain payment of his debt, and that he was willing to allow the defendants the full benefit of all monies levied under the writ in one county, before he would call on the sheriff to return the writ issued into the other, the court of Exchequer, under these circumstances, refused to put the plaintiff to his election, which of the writs he would proceed under, and to set aside the other for irregularity.^c So, if *nulla bona* be returned to a *feri facias*, or *non est inventus* to a *capias ad satisfaciendum*; or *nihil* to an *elegit*, the party may afterwards sue out another writ, of the same or a different species, for the debt, &c.; or if part only be levied on a *feri facias*, or of the goods upon an *elegit*, and

^p Barnes, 208.

^q 2 Saund. 27. 38. (2.)

^r Cowp. 843.

^s 3 Durnf. & East, 657.

^t Palm. 386, 7.

^u Cowp. 843.

^v Bro. Abr. tit. *Execution*, 112. tit. *Faux Judgment*, 6.

^w *Id.* Bro. Brev. Jud. 206. 318. 320.

^x *Ante*, *402.

^a Bac. Abr. tit. *Execution*, D.

^b 2 Dowl. & Ryl. 193.

^c *Cooper v. Rowe & another*, T. 51 Geo. III. in *Scas.* and see 1 Kenyon, 120. 9 Price, 5.

nihil be returned as to the lands,^d he may have a new writ of execution for the remainder: Or, if the *capias ad satisfaciendum* be rendered ineffectual by the death or escape of the party chargeable, the other party may have a new writ for the whole. So, he may sue out and execute several *elegits*, for lands in different counties: And on statutes merchant, statutes staple, and recognizances in nature of statutes staple, the body, goods and lands being all liable by the several acts of parliament that create these securities, the conusee may take all at once, or at different times; and if he extend the lands first, he may afterwards take the body.^e But after part of the debt and costs has been levied on a *feri facias*, the plaintiff cannot regularly sue out another *feri facias* into the same, or *testatum* into a different county, and levy the residue under it, before the return of the first writ.^f So, when the sheriff has taken goods in execution under a *feri facias*, the plaintiff cannot sue out a *capias ad satisfaciendum*, until the *feri facias* has been returned;^g though he should have withdrawn the execution of it.^h And whenever a *capias ad satisfaciendum* is sued out, and the defendant taken under it, the plaintiff cannot afterwards have a *feri facias* or *elegit*, unless the defendant die in *execution, or escape, or be res- [*1034] cued. So, if lands be extended on an *elegit*, and delivered to the plaintiff, he cannot afterwards have a *feri facias* or *capias ad satisfaciendum*.ⁱ And though he take but an acre of land in execution, yet it is deemed a satisfaction of the debt, be it never so great, because it may in time come out of the profits.^k A commitment in execution for three months, for not paying penalties recovered by judgment, in an action on the *Goldsmith's* company's act, (12 Geo. II. c. 26. § 9.) cannot be obtained, till a *feri facias* has been ineffectually issued.^l

There are some cases, however, in which execution cannot be taken out without leave of the court; as where, in actions on a policy of assurance, there is a verdict for the plaintiff against one of several underwriters, and the rest have entered into the *consolidation* rule, and agreed to be bound by it.^m So, though a writ of error abate by the death of the plaintiff in error, before it is returned and certified, yet execution cannot afterwards be issued on the judgment, without leave of the court:ⁿ and the court having set aside the execution on this ground, refused leave for the plaintiff to issue a *testatum fieri facias*, tested in the preceding term, on the return day of the original *feri facias*, which was after the allowance and service of the writ of error.^o And it seems, that on a writ of error *coram nobis*, execution taken without leave of the court is irregular.^p So where, in *ejectment*, the landlord is admitted to defend on the tenant's non-appearance, and judgment is thereupon signed

^d Hob. 58. 1 Lev. 92. 1 Sid. 184. S. C. 1 Str. 226. 2 Ld. Raym. 1451. S. P.

^e Hob. 60. 2 Rol. Abr. 75. Bac. Abr. tit. *Execution*, D.

^f Barnes, 213. and see 2 Chit. Rep. 203. (a.)

^g 2 Chit. 203.

^h 6 Taunt. 370. 2 Marsh. 78. S. C.

ⁱ Cro. Jac. 338, 9. 1 Str. 226. 2 Ld.

Raym. 1451.

^k Bac. Abr. tit. *Execution*, D.

^l 2 Chit. Rep. 139.

^m *Ante*, 494. 664, 5, 6.

ⁿ 7 East, 296.

^o *Id. ibid.*

^p Say. Rep. 166. Barnes, 201. 2 Blac. Rep. 1067.

against the casual ejector, with a stay of execution till further order, and the plaintiff is afterwards nonsuited at the trial, on account of the landlord's not confessing lease entry and ouster, the lessor of the plaintiff must apply to the court, for leave to take out execution against the casual ejector.^a The rule for this purpose is a rule to shew cause, in the King's Bench;^b but, in the Common Pleas, it is absolute in the first instance:^c And where there is a verdict against the landlord, on his appearing at the trial, and confessing lease entry and ouster, judgment may be entered up thereon, and execution issued against him, without applying to the court.^d When a verdict [*1035] is taken *pro formâ* at the trial, for "a certain sum, subject to the award of an arbitrator, the sum afterwards awarded must be taken as if it had been originally found by the jury; and the plaintiff is entitled to enter up judgment, and take out execution for the amount, without first applying to the court for leave."^e But the arbitrator in such case cannot award a *greater* sum than that for which the verdict was taken;^f and if he do, the plaintiff cannot take out an execution for the whole sum awarded;^g nor will an *assumpsit* arise by implication, to pay even to the extent of the verdict;^h though perhaps the court, on application, would assist the plaintiff in recovering to that extent.ⁱ

When several actions are brought against different parties for the same debt, as upon a bail bond, promissory note, or bill of exchange, each party is liable to execution for the whole debt, and the costs of the action against himself; but neither of them is liable to the costs of the actions against the other defendants.^b And in suing out execution in actions upon a bail bond, we have seen, it is usual to apportion the debt and costs in the original action amongst the different defendants, so as to levy a part on each, together with his own costs.[†]

In an action of *debt* on bond for a penalty, the sheriff may be directed to levy the sum secured by the condition, together with the damages and costs recovered by the judgment, and all subsequent costs of the execution, &c.;^d which direction is usually indorsed on the writ. But if judgment be entered up for the *penalty* of a bond given to secure an annuity, and the defendant taken in execution thereon, when the warrant of attorney, under which such judgment was entered up, only authorized the taking out execution for the

^a 2 Str. 1241. 1 Bur. 756, 7. Barnes, 182, 185, 208. 1 Chit. Rep. 47. 233.

^b 1 Chit. Rep. 47. 233. Append. Chap. XLVI. § 25, 6.

^c Barnes, 182, 3. 185. 1 Chit. Rep. 47. but see *id.* 233.

^d *Per Cur. H.* 56 Geo. III. K. B. *Sed quære*: it being usual to apply to the court, for leave to take out execution against the casual ejector, as well after verdict as a nonsuit.

^e 1 East, 401. 1 Bos. & Pul. 97. 480.

^f 3 Bos. & Pul. 244. but see 1 Salk. 84. Barnes, 58. *contra*.

^g *Ante*, 892.

^h *Bonner v. Charlton*, E. 43 Geo. III. K. B.

ⁱ 5 East, 139. *Ante*, 892.

^a 5 East, 143, 4.

^b *Ante*, 526.

^c *Ante*, 327.

^d Cas. Pr. C. P. 90. Pr. Reg. 213. S. C.

[†] It has been decided in the Constitutional Court of South Carolina, that in an action on a bail bond, the plaintiff is not entitled *of course* to recover his *entire demand*, and that the jury may, under particular circumstances, give mere nominal damages. 1 *Nott & M'Cord's Rep.* 64. by 3 *Js. against* 2.

arrears, the court will set aside the execution *in toto*, and not merely charge the defendant *pro tanto*.^e

By a late act of parliament,^f "in every action in which the plaintiff shall be entitled to levy under an execution against the goods of the defendant, such plaintiff may also levy the poundage, fees and expenses of the execution, over and above the sum recovered by the judgment." A *mandamus* is holden to be an action within the meaning of this act, when the party pleads, and damages and costs are given to the prosecutor.^g But the act does not seem to extend to "the crown,"^h or to apply to cases where the levy [*1036] is made under an execution against the goods of the plaintiff, for costs on a judgment of *non pros*,ⁱ &c.; nor where the defendant is taken in execution, on a *capias ad satisfaciendum*. In a case arising before the passing of the above act, it had been holden, that where the defendant suffered judgment by default, in an action of *debt* on simple contract, the plaintiff was not entitled to levy the expenses of the execution, notwithstanding those expenses, together with the debt and costs of the action, did not exceed the sum confessed upon record.^k And a plaintiff, who levies the costs and expenses of an execution, in addition to the sum recovered by the judgment, under the above act, must at his peril take care to keep them within a reasonable amount: and, in the Common Pleas, if it appear, on reference to the prothonotaries, that he has levied too much, the court will order the excess to be restored, with costs to be paid by the plaintiff.^l

A *fieri facias*, we have seen,^m is a common law execution: and, except in a county palatine, is directed to the sheriff of the county where the action is laid;ⁿ commanding him, that of the goods and chattels of the defendant, in his bailiwick, he cause to be *made*, or *levied*, the sum recovered, and have it before the king, or his justices, at *Westminster*, (or, in the King's Bench by original, *where-soever*, &c.) on the return day.^o In a county palatine, it is directed to the chancellor in *Lancashire*, to the chamberlain in *Cheshire*, and to the bishop in *Durham*. In point of form, it should invariably pursue the judgment: therefore it has been holden, that a special execution is not warranted by a general judgment.^p And where a *fieri facias* is sued out after a *scire facias* on a judgment, the *fieri facias* must set out the award of execution on the *scire facias*, as well as the original judgment; even, as it seems, though the *scire facias* was sued out unnecessarily.^q

^e 16 East, 163.

^f 43 Geo. III. c. 46. § 5.

^g 2 Smith R. 8.

^h West, on *Extents*, 238.

ⁱ 7 Taunt. 180. 2 Chit. Rep. 353.

^j 3 Bos. & Pul. 362. and see 2 Blac.

Rep. 760. Forrest, 33.

^k 2 Taunt. 174.

^l Ante, 1030, 31.

^m A writ of *fieri facias* directed in the first instance to the bailiff of the *isle of Ely*, out of the King's Bench, is erroneous and void; and the bailiff is guilty of

a trespass in executing it. 3 East, 128. and see 9 East, 342.

ⁿ For the forms of writs of *fieri facias* for the plaintiff, in the different courts, in *assumpsit*, see Append. Chap. XLI. § 1, &c. in *debt*, id. § 9, &c. in *detinue*, id. § 13. in *covenant*, id. § 17. in *case*, id. § 18. &c. in *replevin*, Chap. XLV. § 73. in *trespass*, Chap. XLI. § 21, &c. and for the defendant, on a *non pros*, &c. id. § 29, &c.

^p 1 Durnf. & East, 80. and see 6 Durnf. & East, 525. 7 Durnf. & East, 27.

^q 1 Bing. 133.

This writ should be *tested* in term time,^r on a day after the judgment is, or may be supposed to have been given: And as the judgment [*1037] relates in law to the first day of the term wherein it is signed, it seems that the *fieri facias* may be tested on any day in that term;^s and it should be made returnable, in term time, on a day certain by *bill*, or by *original*, on a general return day. If it be tested,^t or returnable,^u out of term, or, in an action by *bill*, if it be returnable on a general return day,^v it is void, or at least erroneous; and may be quashed or set aside on motion, together with the proceedings that have been had under it. A writ of *fieri facias* need only be sealed, in the King's Bench:^y But, in order to prevent the fraudulent issuing of a writ of execution, without a judgment to support it, it is a rule,^z that "the sealer of the writs of this court shall not seal any writ of *fieri facias*, or *capias ad satisfaciendum*, without having the judgment paper, *postea*, or inquisition produced to him: and that the attorney concerned for the plaintiff, or his agent, shall, upon every writ of *fieri facias*, and *capias ad satisfaciendum*, indorse the place of abode and addition of the party against whom the writ is issued, or such other description of him, as such attorney or agent may be able to give."^a In the Common Pleas, all executions are required to be signed by the prothonotary;^b and must be so signed, before they are sealed.^c

If the *fieri facias* vary from the judgment, it may be amended thereby, in the body of the writ: And when a *fieri facias* is sued out into a different county from that in which the venue is laid, and the party suing it afterwards takes out a *fieri facias* into the proper county, and gets a return of *nulla bona*, in order to warrant the *fieri facias* which first issued, the courts will permit the first writ to be amended, by inserting the return of *nulla bona* and the *testatum* clause, on payment of costs.^d So, where a *fieri facias* is improperly *tested*,^e or made returnable on a *particular* instead of a *general* return day,^f or on a day out of term,^g or, in the Common Pleas, "before us," instead of "our justices at *Westminster*,"^h it may be amended by the award of execution on the roll: And where [*1038] to a writ of *venditioni exponas*, for goods already taken in execution, with a clause of *fieri facias* for the residue, the sheriff returned that he had made of the said goods 20*l.*, but omitted by *mistake* to return *nulla bona* to the *fieri facias*, the court allowed him to amend the return, and set aside an attachment issued against him for not making it.ⁱ But the court of King's

^r 2 Salk. 700.

^s 1 Crompt. 372.

^t 2 Salk. 700.

^u *Davey v. Hollingsworth* and another, T. 24 Geo. III. K. B.

^v 1 Wils. 155.

^y Imp. K. B. 453. R. E. 1659. K. B. *contra*.

^z R. H. 2 & 3 Geo. IV. K. B. 5 Barn. & Ald. 560. 1 Dowl. & Ry. 471. 2 Chit. Rep. 377.

^a *Id. ibid.*

^b R. E. 12 Jac. I. § 3. C. P. Imp. C. P. 496. *accord.*

^c R. M. 1654. § C. P.

^d 3 Durnf. & East, 657. 1 H. Blac. 541. and see 3 Durnf. & East, 388. 6 Durnf. & East, 450. *Ante*, 770.

^e Say. Rep. 12.

^f 2 Bos. & Pul. 336.

^g *Davey v. Hollingsworth* and another, T. 24 Geo. III. K. B.

^h 5 Taunt. 605. 1 Marsh. 237. S. C.

ⁱ 1 Marsh. 344.

Bench refused to allow the plaintiff to amend a *fieri facias*, where the defendant had become bankrupt before the goods taken under it were sold;^k as such amendment would have prejudiced third persons.

The writ of *fieri facias* being sued out, is delivered to the sheriff, or other officer to whom it is directed, his under-sheriff or deputy; and if directed to the sheriff, he (or more commonly his under-sheriff) makes out a *warrant* thereon, which is delivered to his officer, for the execution of the writ. In a county palatine, the officer to whom it is directed, makes out his writ or *mandate* to the sheriff, who grants a warrant thereon for its execution. And where, a *fieri facias* having been sued out, the defendant pays the plaintiff's attorney the debt and costs, without the delivery of the writ to the sheriff, it is no contempt of the court, to attach the same money in the hands of the plaintiff's attorney, for a debt due from the plaintiff to the defendant.^l

At common law, the *fieri facias* had relation to its *teste*, and bound the defendant's goods from that time; so that if the defendant had afterwards sold the goods, though *bonâ fide* and for a valuable consideration, they were still liable to be taken in execution, into whose hands soever they came.^m This relation being productive of great mischief to purchasers, was taken away by the statute 29 Car. II. c. 3. § 16. which enacts, that "no writ of *fieri facias*, or other writ of execution, shall bind the property of the goods of the party, against whom such writ of execution is sued forth, but from the time that such writ shall be delivered to the sheriff, under-sheriff, or coroners, to be executed; and for the better manifestation of the said time, the sheriff, under-sheriff, and coroners, their deputies and agents, shall upon the receipt of any such writ, (without fee for doing the same,) indorse upon the back thereof, the day of the month or year whereon he or they received the same." But neither before this statute nor since, is the property of goods altered, but continues in the defendant, till execution executed. The meaning *of these words, that "no writ of execution shall bind the [*1039] property, but from the delivery of the writ to the sheriff, &c." is, that after the writ is so delivered, if the defendant make an assignment of his goods, unless in market overt, the sheriff may take them in execution.ⁿ

This statute, being made in favour of purchasers, does not alter the law as between the parties: therefore, if the execution be tested in the defendant's lifetime, it may be taken out,^o and executed,^p after his death. And the sheriff deriving his authority from the

^k 4 Maule & Sel. 329.

^l 4 Taunt. 472.

^m Gilb. Exec. 13, 14. 8 Co. 171. Cro. Eliz. 174. 440. Cro. Car. 149. 2 Vent. 218. 7 Durnf. & East, 21, 2. but see 1 Lev. 174.

ⁿ 2 Eq. Cas. Abr. 381. and see 1 Ld. Raym. 252. 4 East, 539, 40.

^o 1 Ld. Raym. 695. Com. Rep. 117. Bunb. 271. 12 Mod. 5. 2 Ld. Raym. 850.

7 Mod. 95. S. C. and see 3 P. Wms. 399. and the case of *Finch v. earle of Winchester*, *id. in notis*. Willes, 131. 7 Durnf. & East, 20. 1 Bos. & Pul. 571. *Aliter*, if the execution be tested after the defendant's death. 6 Durnf. & East, 368.

^p Gilb. Exec. 15, 16. Law of Exec. 46. Cro. Eliz. 181. Comb. 23. O. Bridg. 468, 9. 1 Mod. 188. Pr. Reg. 215. 7 Durnf. & East, 20.

writ, it has been holden, that if the plaintiff die after a *fieri facias* sued out, it may be executed notwithstanding; and his executor or administrator shall have the money.¹ Or if the plaintiff have made no executor, or administration be not committed, the money must be brought into court, and there deposited, until, &c.²

The king is not bound by this statute;³ and therefore, an *extent* at his suit still binds from the *teste* or *fiat* of the baron on which it issues.⁴ And as between *different* plaintiffs, if two writs of execution be delivered to the sheriff, on the same or different days, he ought to execute that first which was first delivered,⁵ except it be fraudulent, and then he ought to execute the other,⁶ and the court on motion will not assist the plaintiff in the second execution.⁷ But if the sheriff levy goods in execution, by virtue of the writ last delivered, and make sale of them, whether the last writ was delivered upon the same or a subsequent day, the property of the goods is bound by the sale, and the party cannot seize them by virtue of his execution first delivered; but he may have his remedy against the sheriff.⁸ If a second *fieri facias* be delivered to the sheriff, after he has the defendant's goods in possession under a prior writ, [*1040] the goods are bound by *the second execution, subject to the first, from the day of the delivery of the last writ to the sheriff; and that, even without a warrant on the second writ, or further seizure.⁹ Two writs of *fieri facias*, at the suit of different plaintiffs, were issued against the same defendant, and the goods taken under them were not more than sufficient to satisfy the first execution; the officer, under the second writ, continued in possession until the goods were sold by the sheriff, after which the defendant obtained a rule for setting aside the first execution, and pending that rule, there were conferences between all the parties: The rule however was made absolute, and the sheriff ordered to pay to the defendant the proceeds of the levy: The sheriff, having so paid the money, without having applied to the court for relief, and without having given any notice to the plaintiff in the second execution, was held liable to him for the amount, in an action for a false return of *nulla bona*.¹⁰

By this writ, the sheriff has authority to seize and sell every thing that is a chattel, belonging to the defendant,¹¹ except his necessary wearing apparel: It has even been holden, that if the defendant have two gowns, the sheriff may sell one of them;¹² And he may sell *leases*, or terms for years, and *fructus industriales*, as corn

¹ Cro. Car. 459. 1 Sid. 29. 2 Ld. Raym. 1073. 1 Salk. 322. S. C.

² Noy. 73. 2 Ld. Raym. 1073.

³ 3 Atk. 739. 1 Vez. 196.

⁴ Bunb. 39. Gilb. Rep. 222. 2 Str. 754. S. C. 2 Blac. Rep. 1251.

⁵ 1 Durnf. & East, 720. and see 4 East, 539, 40. 7 Taunt. 56. 2 Marsh. 375. S. C. 1 Dowl. & Ryl. 307.

⁶ 1 Wils. 44. and see Peake's Cas. N. Pri. 66. 4 East, 523.

⁷ 1 Durnf. & East, 729. and see 4 East, 539, 40. 7 Taunt. 56. 2 Marsh. 375. S. C.

⁸ 1 Ld. Raym. 252. 1 Salk. 320. Carth.

⁹ 419. S. C. and see the case of *Rybot v. Peckham*, 1 Durnf. & East, 731. *in notis*. 4 East, 523.

¹⁰ 7 Taunt. 56. 2 Marsh. 375. S. C. and see 3 Moore, 83. 1 Bing. 71.

¹¹ 8 Barn. & Ald. 95.

¹² Gilb. Exec. 19. 3 Co. 12.

¹³ Comb. 356.

growing, which goes to the executor,^a or fixtures which may be removed by the tenant.^f But where the growing crops of a tenant having been seized under a *fieri facias*, a writ of *habere facias possessionem* was subsequently delivered to the sheriff, in an *ejectment*, at the suit of the landlord, founded on a demise made long before the issuing of the *fieri facias*, the court held, that the sheriff was not bound to sell the growing crops under the *fieri facias*, inasmuch as they could not in point of law, be considered as belonging to the tenant, the latter being a trespasser from the day of the demise in ejectment.^g And furnaces, or apples upon trees, which belong to the freehold, and go to the heir, cannot be sold by the sheriff on this writ.^h So, the sheriff has no right, under a *fieri facias*, to seize fixtures, where the house in which they are, is the freehold of the person against whom the execution issues.ⁱ So, where A mortgaged land with a windmill thereon, (built chiefly of wood,) the deed containing also a bargain and sale of the mill, the court of Common Pleas, held, that it could not be taken [*1041] in execution by a creditor of A., though A. remained in possession.^k And where certain machinery, together with a mill, had been demised for a term to a tenant, and he, without permission of his landlord, severed the machinery from the mill, and it was afterwards seized and sold by the sheriff, under a *fieri facias*; the court held, that no property passed to the vendee, and that the landlord was entitled to bring *trover* for the machinery, even during the continuance of the term.^l

Also, by the statute 56 Geo. III. c. 50. § 1. "no sheriff or other officer in *England* or *Wales* shall, by virtue of any process of any court of law, carry off, or sell or dispose of for the purpose of being carried off, from any lands let to farm, any straw threshed or unthreshed, or any straw of crops growing, or any chaff, colder, or turnips, or any manure, compost, ashes or sea-weed, in any case whatsoever; nor any hay, grass or grasses, whether natural or artificial, nor any tares or vetches, nor any roots or vegetables, being produce of such lands, in any case where, according to any covenant or written agreement, entered into and made for the benefit of the owner or landlord of any farm, such hay, grass or grasses, tares and vetches, roots or vegetables, ought not to be taken off or withholden from such lands, or which, by the tenor or effect of such covenants or agreements, ought to be used or expended thereon, and of which covenants or agreements such sheriff or other officer shall have received a written notice, before he shall have proceeded to sale." And "no sheriff or other officer shall, by virtue of any process whatsoever, sell or dispose of any clover, rye-grass, or any artificial grass or grasses whatsoever, which shall be newly sown, and be growing under any crop of standing corn." Provided that

^a Gilb. Exec. 19. 1 Salk. 368.

^f 1 Salk. 368. 3 Atk. 13.

^g 5 Barn. & Ald. 88. and see 9 Price, 287.

^h Gilb. Exec. 19.

ⁱ 5 Barn. & Ald. 25. 1 Dowl. & Ryd.

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^k 4 Moore, 281. 1 Brod. & Bing. 506.

^l C. C.

¹ 5 Barn. & Ald. 826. 3 Stark. N. Pri.

130. S. C.

= § 7.

this act shall not extend to any straw, turnips or other articles, which the tenant may remove from the farm, consistently with some contract in writing."^a This statute, although passed for the public benefit, in promoting good husbandry, does not bind the crown: Therefore, sales of growing crops, &c. seized under prerogative process, are not within it; and the sheriff must sell them unconditionally: nor can they be sold as being subject to tithe.^o

Money found in the defendant's possession may, it seems, be taken in execution;^p but the court will not order money in the sheriff's hands, being the surplus of money levied under a former [*1042] execution *against the defendant's goods, at the suit of the same plaintiff,^q or damages recovered by the defendant against the sheriff in another action^r, or money levied under an execution at the suit of the defendant against a third person,^s to be paid over to the plaintiff, in satisfaction of his demand. And the sheriff cannot take bank notes,^t &c.; nor goods pawned, or gaged for debt; nor goods demised or letten for years; nor goods distrained,^u or taken and in custody of the sheriff upon a former execution;^x nor any thing which cannot be sold, as deeds, writings,^y &c. But goods pawned may be taken on an execution against the pawnee, upon satisfaction of the pledge.^z And though it be said, that in the case of a lease of land and of a stock of cattle for a year, they cannot be taken in execution during the term;^a that is, because the lessor himself could not have dispossessed his tenant during the year, and of course the lessor's creditor cannot: But subject to the right of the pawnee or lessee, the goods may it seem be taken in execution.^b

A mere equitable interest in a term for years cannot be taken in execution by the sheriff, under a writ of *fieri facias*, at the suit of a judgment creditor:^c and therefore, when the defendant has only an equity of redemption in a leasehold estate, an execution will not affect it, as the legal estate is in the mortgagee.^d The plaintiff's only remedy in that case, is by filing a bill in equity, to redeem the estate by paying off the principal and interest due on the mortgage.^d But before he is entitled to redeem, he must first take out a writ of execution against the goods of the defendant;^e though it does not seem to be necessary to have it returned.^f

^a § 8.

^o 6 Price, 94.

^p Doug. 231. but see 4 East, 510. 9 East, 48. 3 Brod. & Bing. 294.

^q 4 East, 510.

^r 2 New Rep. C. P. 376.

^s 9 East, 48. 3 Brod. & Bing. 294. but see Doug. 231. *contra*.

^t Cas. temp. Hardw. 53. 9 East, 48.

^u Bac. Abr. tit. *Execution*, 362, and see Willes, 131. 5 Moore, 79. 2 Brod. & Bing. 362. S. C.

^x 2 Show. 173. 3 Mod. 236. and see 5 Moore, 79. 2 Brod. & Bing. 362. S. C. 9 Price, 287. *Post*, 1049.

^y Cas. temp. Hardw. 53.

^z Bro. Abr. tit. *Pledges*, pl. 28.

^a *Id. ibid.* and *id.* tit. *Execution*, pl. 107.

^b 8 East, 476. 479. and see 15 East, 607.

^c 8 East, 467. 2 New Rep. C. P. 461.

^d S. P. and see 3 Bro. Chan. Cas. 480. 1 Vcs. jun. 431.

^e 3 Atk. 200. 739. and see Forrest, 162, 3. 4 Moore, 281. 1 Brod. & Bing. 506. S. C.

^f 3 Atk. 200. and see 1 Vern. 399. 1 P. Wms. 445. 6 Vcs. 72. 1 Madd. Chan. 205. 522, 3.

^g Redead. Pl. 3 Ed. 102. 1 Madd. Chan. 205. (r.)

In assigning a term for years, which has been taken in execution, it is not necessary for the sheriff to state in the assignment, the particular interest which the defendant has, for he may not be able to come at the precise knowledge of it; but it is sufficient for him to state, that the defendant is possessed of the premises, for a term of *years yet to come and unexpired, and to assign all his [*1043] interest therein generally;^g and it is more prudent in the sheriff to state the interest in this way; for if he attempt to state it particularly and fail, the vendee will not have a good title.^h It is said, that if a sheriff, on a *feri facias*, sell a lease or term of a house, he cannot legally put the party out of possession, and the vendee in; but the vendee must bring his ejectment.ⁱ This, however, must be understood of a forcible expulsion; for it has been determined, that under a *feri facias*, the sheriff may justify expelling the defendant peaceably,^k or, in other words, if the defendant will consent to go out, the sheriff may put the vendee in possession. If the defendant, subsequent to the delivery of the writ to the sheriff, make an assignment of a leasehold estate, the judgment creditor need not bring a suit in equity to come at the estate, by setting aside the assignment; but may proceed at law to sell the term, and the vendee, who is generally a friend of the plaintiff, will be entitled at law to the possession, notwithstanding such assignment.^l And where an outgoing tenant had agreed to assign the remainder of his term to the incoming tenant, it was holden, that the sheriff, before an actual assignment made, might, under an execution against the outgoing tenant, sell his interest in such remaining term, and set upon it the same value that the incoming tenant had agreed to give for it.^m Where a lease by deed was taken in execution, and an assignment made in the name and under the seal of office of sheriff, by A. B. acting as undersheriff; the court held, that such assignment was sufficiently proved, without proving further the appointment of A. B. as undersheriff, and that he was authorized by deed, to execute deeds in the name of the sheriff.ⁿ

The sheriff, upon this writ, may take any goods which have been fraudulently sold, or conveyed away by the defendant; and a principal badge of fraud is the defendants continuing in possession.^o For if a man sell goods, and still continue in possession, as visible owner of them, such sale is fraudulent and void as against creditors.^p In cases of this nature, the notoriety of the change of possession is the question on which the validity or invalidity of the transaction *depends:^q Therefore, if an assignment be made of house- [*1044] hold furniture, and the assignor continue in possession, it is not protected against an execution at the suit of one of his creditors,

^g 4 Co. 74. Cro. Eliz. 584. S. C. 3 Durnf. & East, 292. 8 East, 475.

^h *Id.* *ibid.* 3 Durnf. & East, 294.

ⁱ 2 Show. 85.

^k 3 Durnf. & East, 292.

^l 3 Atk. 739.

^m 1 Marsh. 10.

ⁿ 5 Barn. & Ald. 243.

^o Gilb. Exec. 15. and see *Twyne's* case, 3 Co. 81. Godb. 161. 2 Durnf. & East, 587. 1 Esp. Rep. 205. 357, 8. 8 Durnf. & East, 82. 521. but see 2 Bos. & Pul. 59. 3 Esp. Rep. 52. S. C. 3 Taunt. 256. 4 Moore, 281. 1 Brod. & Bing. 506. S. C.

^p Prec. in Chan. 286, 7.

^q 1 Gow, 34, 5. *per Dallas*, Ch. J.

unless the assignment were notorious.* So, if a creditor by *feri facias* seize the goods of his debtor, and suffer them to remain long in the debtor's hands, and another creditor obtain a subsequent judgment and execution, it has been determined often, that this is evidence of fraud in the first creditor, and the goods in the hands of the debtor remain liable.[†] So, where it was proved, in an action for a false return, that the warrant upon a *feri facias* was directed to three persons as special bailiffs; that the plaintiff's attorney was present at the time of executing it, and ordered one of the persons to use the defendant kindly, and not to take any of his household goods, for that his landlord would soon be in the country, and pay the debt; and thereupon another of the persons rode round the farm and grounds, and said "*I seize all this corn and cattle,*" and took some account thereof, for the use of the plaintiff; afterwards the landlord sued out a *feri facias*, and the sheriff's bailiffs not being in possession of the goods under the former writ, nor having left any body for them, he got his execution executed; and there was no proof that he promised to pay the plaintiff: it was left to the jury, upon this evidence, whether the first execution was intended to be, or was really executed; and the jury thought it was not, and gave a verdict for the sheriff, which was afterwards confirmed by the court, on a motion for a new trial.[‡] So, where a sheriff's officer executed a writ of *feri facias*, by going to the house, and informing the debtor he came to levy on his goods, and laying his hands on a table, and saying, "*I take this table,*" upon which he locked up his warrant in the table drawer, took the key, and went away, without leaving any person in possession, and after the *feri facias* was returnable, but not continued, the landlord distrained the goods for rent; the court held, that the sheriff could not maintain *trespass* against him.[§] So, if the party at whose suit a sequestration out of Chancery is issued, take no measure to compel the execution of it in due time, and the sequestrators do not in fact possess themselves of the goods, it is no excuse to a sheriff, to whom, at a distance of eighteen months, a writ of *feri facias* is directed against the goods of the party defendant in the suit in Chancery, for not executing such writ, and selling the goods; the plaintiff in the [*1045] sequestration having at all events lost his priority by such laches: and therefore the sheriff, who had seized goods under the *feri facias*, having, on notice of such supposed obstacle, returned *nulla bona*, was holden liable to the plaintiff, in an action for a false return.^{||}

But if the defendant sell his goods *bonâ fide*, and for a valuable consideration, before the delivery of the writ to the sheriff, they cannot be taken in execution: and though he sell them fraudulently, yet if they be afterwards sold to another *bonâ fide*, they are not liable to be taken in the hands of the second vendee.[¶] And if A.

* 1 Gow, 33.

† Prec. in Chan. 286, 7. 1 Vez. 245. 456. and see 3 Taunt. 400.

‡ 1 Wils. 44. and see 1 H. Blac. 543. Peake's Cas. N. Pri. 65. 2 Campb. 48. 3

Maule & Sel. 175. 8 Price, 95.

§ 1 Maule & Sel. 711.

¶ 4 East, 323.

¶ Godb. 161.

indebted to B. and C., after being sued to judgment and execution by B., go to C. and voluntarily give him a warrant of attorney to confess judgment, on which judgment is immediately entered, and execution levied on the same day on which B. would have been entitled to execution, and had threatened to sue it out; the preference so given by A. to C. is not unlawful nor fraudulent, within the meaning of the statute 13 *Eliz. c. 5.*² So, where an insolvent debtor, being sued by the plaintiff, executed an assignment of all his effects to trustees, pending the suit and before execution, for the benefit of all his creditors, under which possession was immediately taken; the court of King's Bench held, that the assignment was not fraudulent within the above statute, although made with intent to delay the plaintiff of his execution.^a So, where the plaintiff having purchased a public house, for which he could not himself obtain a licence, put B. an insolvent person into the house as his servant, to keep it for him, and supplied him with money to pay for the licence, which was granted to B., and also purchased all the liquors and provisions that were consumed in the house; a majority of the judges of the court of Common Pleas held, that the sheriff was not entitled to take, under an execution against B., the plaintiff's goods in the house, committed to B.'s custody; for though B. was the ostensible owner of the goods, yet that was not deemed sufficient to justify the execution: If it were, there would have been no occasion for the statute 21 *Jac. I. c. 19. § II.*: and it has never yet been holden, (unless where, as in *Twyne's case*,^b the original owner has sold goods and retained the possession, and except in cases of bankruptcy on the above statute,) that a person may not give the possession of his goods to another, without subjecting them to an execution for his debt.^c So, where a creditor having taken the goods of a defendant in execution, upon a *judgment con- [*1046] fessed on a warrant of attorney, bought them by public auction, and took a bill of sale from the sheriff for a valuable consideration, after which he let the goods to the former owner, for a rent which was actually paid; the court of Common Pleas held, that the creditor had a title, which could not be impeached as fraudulent by other creditors, having executions against the same defendant.^d And although A. cohabit with B., and assume his name, and pass for his wife, and permit him to appear to be the owner of the furniture of the house in which they live, the furniture, being her property, is not liable to be taken under an execution against B.^e

^a 5 Durnf. & East, 235.

^b 3 Maule & Sel. 371.

^c 3 Co. 81.

^d 3 Taunt. 256. and see 2 Bos. & Pul. 59. 3 Esp. Rep. 52. S. C.

^e 4 Taunt. 823. and see 1 Maule & Sel.

251. 4 Campb. 383. 1 Stark. *Ni. Pri.* 367.

1 Moore, 189. 1 Gow. 35. n. 8 Taunt. 676.

3 Moore, 11. S. C. 8 Taunt. 838.

• 2 Stark. *Ni. Pri.* 396.

† So, where the *bona fide* assignee of a bill of sale executed by the sheriff under a *fi. fa.* against the goods of A., allowed the latter to remain in the possession and enjoyment of the goods until another execution was levied on them, it was held, that the first execution being notorious, the assignee of the bill of sale might maintain trespass against the sheriff; and that an absolute change of possession was not necessary to give effect to the bill of sale as against creditors. 7 *Dowl. & Ryd.* 106.

In an action against one of two *partners*, the sheriff must seize all their joint property, because the moieties are undivided; for if he seize but a moiety, and sell that, the other will have a right to a moiety of that moiety; but he must seize the whole, and sell a moiety thereof undivided, and the vendee will be tenant in common with the other partner.^c The goods being once seized, and in custody of the law, they cannot be seized again by the same or another sheriff; and if they were seized under a second execution, and sold thereon, the bargain would be void.^d And the sheriff cannot sell more than an undivided moiety, belonging to the defendant; for the property of the other moiety is not affected by the judgment, nor by the execution:^e consequently, the interest or share of the other partner or partners remains, so that a return of *nulla bona* to an execution against them would be false, and the sheriff liable to an action for making it.^f If the sheriff, under an execution against one of several partners, sell the whole of the property, he would it seems be liable to an action of *trover*, or for money had and received, at the suit of the rest. And where the defendant was partner with another person, against whom a commission of bankruptcy had issued, but before the bankruptcy, the plaintiff had taken out execution, and levied on the partnership effects; the bankrupt's assignees obtained a rule of the court of King's Bench to shew cause, why the sheriff should not pay them a moiety of the money arising from the sale of the goods taken in execution, upon an affidavit of the bankrupt, that he was entitled to an equal share [*1047] of the partnership effects: and *although the plaintiff, in his affidavit on shewing cause, denied that the bankrupt had such share, and stated that he had embezzled the joint stock to a considerable amount, the court directed that it should be referred to the master, to take an account of the share of the partnership effects to which the bankrupt was entitled, and that the sheriff should pay a part of the money levied, equal to the amount of such share, to the assignees.^g But in such case, the court of Common Pleas would not, at the request of the partnership creditors, give the sheriff time to return the writ, until an account could be taken of the several claims upon the partnership property:^h And a *feri facias* having issued against the effects of the defendant, who was jointly concerned in a manufactory with other persons, to whom he was indebted to a greater amount than his whole share, and the sheriff having seized the whole of the partnership property, that court refused to refer it to the prothonotary, to enquire what was the defendant's interest in the effects seized.ⁱ In an action against the sheriff, for not selling goods, the joint property of A. and B., under an execution against the goods of A., it seems that *half* the value of

^c 1 Salk. 392. and see Comb. 217. Com. Rep. 277. 1 Vez. 239. Cowp. 449. 1 East, 367. 4 Ves. jun. 396. In what is stated above, it is supposed that the partners have equal shares of the property; but the doctrine will extend also to the case of partners whose shares are unequal.

^d 1 Show. 169.

^e 2 Ld. Raym. 871.

^f 1 Show. 169.

^g Doug. 650.

^h 3 Bos. & Pul. 288.

ⁱ *Id.* 289.

the whole goods is the proper measure of damages.^a It should also be remembered, as connected with this subject, that where three partners (two of whom resided abroad, and one in *England*), were sued for a partnership debt, and the partner resident in *England* appeared to the action, but refused to appear for the partners who resided abroad, the sheriff was holden to be justified, under a *distingas* issuing out of the Common Pleas against the two partners, in taking partnership effects, though paid for by the partner resident in *England* alone, to whom the partnership was largely indebted; and the court of Common Pleas would not relieve him from such distress.^o

On a *fieri facias*, the sheriff is bound at his peril to take only the goods of the defendant: and therefore if he take the goods of a third person, though the plaintiff assure him they are the defendant's, he is a trespasser; for he is obliged at his peril to take notice whose the goods are: and if he doubt whether the goods shown him are the defendant's, he may summon a jury *de bene esse*, to satisfy himself.^p This may be given in evidence, to show that the sheriff has not acted maliciously;^q and will mitigate damages in an action of *trespass* *against him, for taking the goods of a third person.^r And [*1048] as it is not a proceeding immediately from the court, but merely to indemnify the sheriff in making his return to the writ, the court will not set aside the inquisition of a jury, summoned by the sheriff to inquire in whom the property of goods seized by him under a *fieri facias* is vested.^s But this proceeding of the sheriff is not conclusive in any case; for inquests of office are always traversable: and therefore an inquisition made by the sheriff's jury, to ascertain to whom the property of goods taken under a *fieri facias* belonged, though found in favour of *A.*, is not admissible evidence in an action of *trover* for the goods, brought by *A.* against the sheriff:^t nor is such an inquisition admissible evidence for the sheriff, in an action on the *case* against him, for a false return of *nulla bona*.^u

As the sheriff cannot take the goods of a third person, so if the defendant become *bankrupt*, before the delivery of the writ to the sheriff, or, as it should seem, before it is actually executed,^v the sheriff cannot legally take or dispose of them, after notice of the act of bankruptcy, and of a commission sued out, or docket struck: For, *per Holt*, Ch. J. "If a writ of execution be delivered to the sheriff against *A.* who becomes bankrupt before it is executed, the execution is superseded; consequently, the property of the goods is not absolutely bound by the delivery of the writ to the sheriff."^w And therefore, where goods are seized under a *fieri facias*, the same day that the defendant commits an act of bankruptcy, evidence should

^a 2 Stark. *Ni. Pri.* 218. *Ante*, 923.

^o 3 Bos. & Pul. 254. *Ante*, 109.

^p Dalt. Sher. 146. Gilb. *Exec.* 21. Bac. Abr. tit. *Execution*, 352. 4 Durnf. & East, 633. 648. 7 Durnf. & East, 177. 3 Maule & Sel. 175.

^q 3 Maule & Sel. 175.

^r Dalt. Sher. 146. Gilb. *Exec.* 21. Bac. Abr. tit. *Execution*, 352, 4 Durnf. & East,

633. 648. 7 Durnf. and East, 177. 3 Maule & Sel. 175.

^s 6 Durnf. & East, 88.

^t 2 H. Blac. 437.

^u 3 Maule & Sel. 175.

^v 1 Lev. 173, 4.

^w 1 Ld. Raym. 252. and see 2 Eq. Cas. Abr. 381.

be given to prove at what time of the day the goods were seized, and the act of bankruptcy was committed.* But if the sheriff seize and sell the goods, before he has notice of an act of bankruptcy, &c. he is excused;† and if he sell them after such notice, though he may be sued in *trover*,‡ yet he is not liable to an action of *trespass*.§ Also, by the statute 49 Geo. III. c. 121. § 2. “all executions against the goods and chattels of a bankrupt, *bona fide* executed or levied more than *two* calendar months before the date and issuing of the commission, shall be valid and effectual, notwithstanding any prior act of bankruptcy committed by such bankrupt, in like manner as if no such prior act of bankruptcy had been committed; provided [*1049] the person, *at whose suit such execution shall have issued, had not at the time of executing or levying the same, any notice of any prior act of bankruptcy by such bankrupt committed, or that he was insolvent, or had stopped payment: provided always, that the issuing of a commission of bankrupt, although such commission shall afterwards be superseded, shall be deemed such notice, if it shall appear that an act of bankruptcy had been actually committed at the time of issuing such commission.”

An execution against the goods of a bankrupt, taken out after his certificate is signed, but before it is allowed, is valid:¶ And where a defendant was taken in execution under similar circumstances, and paid the debt and costs to the sheriff, the court on application refused to relieve him.‡ But if a *fieri facias*, issued against a bankrupt before his certificate obtained, be not executed till after, the court will order the goods to be restored, even though he has not pleaded his certificate;§ and if any thing be alleged to invalidate the effect of the certificate, the court will direct a trial on a plea of bankruptcy.¶ The sheriff having levied upon goods in possession of a defendant, who was a bankrupt, paid over the proceeds to the assignees, on their claiming them; and the defendant afterwards again becoming a bankrupt, and obtaining his certificate, but not paying 15s. in the pound, (and therefore not being protected by 5 Geo. II. c. 30. § 9.) a second execution issued for the same debt; and the court held, that the latter execution was regular, though the first was not returned.‡ If a sheriff take in execution the goods of a defendant, who afterwards becomes bankrupt, and sell at one time, after the bankruptcy, sufficient goods to satisfy both that execution, and also another which was delivered to him after an act of bankruptcy, the assignees may recover against him in *trover*, for such of the goods as were sold after he had raised money enough to satisfy the first execution.‡ And the vendee of a growing crop of grass, may maintain *trespass* against the sheriff, whose bailiff had seized and sold it under a *fieri facias* against the vendor, where the person

* 4 Campb. 197.

† 1 Blac. Rep. 205. 2 Blac. Rep. 829. S. P.

‡ 1 Kenyon, 395. 1 Bur. 20. 1 Blac. Rep. 65. S. C.

§ 1 Durnf. & East, 475.

¶ 1 Durnf. & East, 361. and see 1 Blac.

Rep. 400.

¶ *Neatly and Bagleton*, E. 24 Geo. III. K. B.

‡ 1 Bos. & Pul. 427.

§ *Id. ibid.*

‡ 2 Chit. Rep. 114.

‡ 8 Taunt. 527.

claiming under the sale from the bailiff entered and carried it away by his authority.^k

On a *fiery facias* against a *husband*, it seems that the sheriff cannot take in execution goods fairly vested in *trustees*, under a settlement before marriage, for the benefit of the *wife*.^l Therefore, where ^aa woman before marriage, with the consent of her [^{*1050}] intended husband, conveyed all her stock in trade and furniture to trustees, to enable her to carry on her trade separately; it was holden, that if the husband did not intermeddle therewith, and there was no fraud, such effects, though fluctuating, were not liable to be taken in execution for his debts.^m And a settlement after marriage would, it seems, have the same effect, if made in consequence of a prior agreement;ⁿ or for a good and valuable consideration, and without fraud.^o It is no objection to the settlement in these cases, that there is no inventory of the goods:^p and the possession of the husband, if consistent with the deed,^q will not subject them to an execution for his debts, provided it be satisfactorily proved, that they were really and *bona fide* conveyed to a third person as a trustee for his wife, and possession taken by such third person.^r But when the settlement is fraudulent,^s or the husband is suffered to carry on the trade intended for his wife,^t and his possession is not consistent with the deed,^u the goods are not protected: And it is settled, that a term vested in the wife before marriage, and which the husband is entitled to in her right, may be taken in execution for the husband's debt.^x On a *fiery facias* against the wife, who married pending the action, it would be irregular to take the goods of the husband:^y And although A. cohabits with B. and assumes his name, and passes for his wife, and permits him to appear to be the owner of the furniture of the house in which they live, the furniture, we have seen,^z being her property, is not liable to be taken under an execution against B. It has been determined, that a tradesman supplying a married woman, living apart from her husband, with furniture upon hire, does not thereby divest himself of the present right of property in such goods; inasmuch as the married woman was legally incapable of acquiring it by any contract; and therefore, if the sheriff takes such goods in execution, at the suit of the husband's creditor, *trover* lies by the tradesman:^a but if the contract had been valid, the goods being let to hire generally, without any time limited, notice to determine it, given to the sheriff's officer, and not to the other contracting party, would not have been sufficient to determine the contract.^b

^{*}On a *fiery facias* against an *executor*, for his own debt, [^{*1051}]

^k 9 Price, 287.

^l Cowp. 432. and see Co. Lit. 351. a. n. 1. but see 2 Vern. 239.

^m 3 Durnf. & East, 618. and see *id.* 620. n. 8 East, 477. 479.

ⁿ 2 Eq. Cas. Abr. 148.

^o 8 Durnf. & East, 521. and see 6 East, 257.

^p 3 Durnf. & East, 618. but see Cowp. 437. 6 East, 257.

^q Cowp. 432. 3 Durnf. & East, 620. *in notis.*

^r 2 Esp. Rep. 574.

^s 6 East, 257.

^t 3 Durnf. & East, 618.

^u 8 Durnf. & East, 82.

^x 4 Durnf. & East, 638, 9.

^y 3 Maule & Sel. 559.

^z *Anle*, 1046.

^a 15 East, 607.

the goods of the testator, in the hands of the defendant, cannot be taken in execution.^b But if an executrix use the goods of her testator as her own, and afterwards marry, and then treat them as the goods of her husband, she shall not be allowed to object to their being taken in execution for her husband's debt.^c

The sheriff, on a *fiery facias*, may enter the house of the *defendant* when the *outer* door is open, in order to take the goods of the defendant.^d So, on a *fiery facias* against the goods of an intestate, in the hands of his administratrix and her husband, the sheriff may enter the house of the husband, to search for the goods of the intestate, though none be found therein; because that is the most natural place of custody for them.^e So, if the defendant has goods in the house of a *stranger*, the sheriff may enter it on a *fiery facias*, for taking them in execution. But there is this difference between his entering the house of the defendant, and a stranger; that in the former case, his justification does not depend on his finding, or not finding the defendant's goods therein;^f but in the latter case, he is not justified, unless it should turn out that the defendant has goods in the house; which are liable to be taken in execution.^g There seems to be no settled rule, as to the length of time the sheriff should continue in the house of the defendant, or a stranger, upon a *fiery facias*; but as his object in entering is to take the goods, he ought not to stay there, without the consent of the tenant, longer than is necessary or reasonable for that purpose.

In executing a writ of *fiery facias*, or other process at the suit of a common person, the sheriff cannot regularly break open the outer door of a dwelling house.^h This privilege, which the law allows to a man's habitation, arises from the great regard it has to every man's safety and quiet; and therefore protects them from those inconveniences which must necessarily attend an unlimited power in the sheriff and his officers in this respect: and hence it is, that every man's house is called his castle.ⁱ It is even said, that he cannot open a latch:^k And where the door was a little opened, to see who was [*1052] there, and the bailiffs rushed in with drawn swords, they were punished by the court for their misbehaviour.^l This privilege of a man's house, however, extends only to the owner, and shall not protect the goods of any person conveyed thither to prevent a lawful execution: Therefore, if a *fiery facias* be directed to the sheriff to levy the goods of A., and it happen that A.'s goods are in the house of B.; if, after request made by the sheriff to B. to deliver

^b 4 Durnf. & East, 621. but see *id.* 625.

(a) *semb. contra.*

^c 1 Bos. & Pul. 293. 2 Esp. Rep. 657.

S. C.

^d 5 Ca. 92. a.

^e 5 Taunt. 765. 1 Marsh. 333. S. C.

^f 5 Taunt. 769, 70. *Per Gibbs*, Ch. J. *Id.* 765. 1 Marsh. 333. S. C.

^g *Id. ibid.* and see Palm. 52. 2 Lutw. 1434. 6 Taunt. 246. 1 Marsh. 565. S. C.

^h 18 Ed. IV. 4. *pl.* 19. 5 Co. 93. Gilb. Exec. 17, 18. Lofft, 374. Cowp. 1. 14 East, 1. 163.

ⁱ Bac. Abr. tit. *Sheriff*, N. 3.

^j Dalt. 350.

^k Hob. 62. and see *id.* 263, 4.

† If an outer door be *partly* closed by those within, who are resisting the entrance of the officer, and be not entirely shut, the officer is guilty of a trespass should he oppose them with force, and thereby gain an entrance. 2 *Hawks, N. Car. Rep.* 336.

these goods, he refuse, the sheriff may well justify the breaking and entering his house.^m So, if the sheriff's bailiffs enter the house, the door being open, and the owner lock them in, the sheriff may justify breaking open the door, for setting them at liberty; for if in this case he were obliged to stay till he could procure a *homine replegiando*, it might be highly inconvenient.ⁿ It has been adjudged, that the sheriff, on a *fieri facias*, may break open the door of a barn, standing at a distance from the dwelling house, without requesting the owner to open the door, in the same manner as he may enter a close,^o &c.: And when the officers are once in the house, they may break open any *inner* doors, or trunks, for executing the writ;^p and, according to a late case,^q they need not demand entrance at the inner doors, before they are broken open. It also seems, that as goods may be distrained, so they may be taken in execution, through the windows of a house, if open.^r

A seizure of part of the goods in a house, by virtue of a *fieri facias*, in the name of the whole, is a good seizure of all:^s And the sheriff, by the seizure, has such a property in the goods, that he may maintain *trespass* or *trover* against the defendant, or a third person, for taking them away.^t On a *fieri facias*, it is the duty of the sheriff to sell the goods, if the debt and costs are not paid him;^u and as he cannot retain them to his own use, on satisfying the debt of his proper money,^v so neither can he deliver them to the plaintiff, in satisfaction of his debt.^w But they may be sold to the plaintiff, though not actually delivered to him without a sale;^x and the sheriff may sell them after the return of the writ, and even after he is out of office, without a **venditioni exponas*.^y The sheriff having taken goods in [^{*1053}] execution under a *fieri facias*, is not it seems justified in selling them by auction to the highest bidder, greatly under their value; but if he cannot obtain a reasonable price, should return that they remain in his hands for want of buyers.^b

Before the removal of the goods, the sheriff should take care, if the defendant be tenant of the premises on which the goods are taken, that the landlord be satisfied what, if any thing, is due to

^m 5 Co. 93. a. 1 Sid. 186.

ⁿ Cro. Jac. 555. 2 Rol. Rep. 137. Palm. 52. S. C.

^o 1 Sid. 186. 1 Keb. 698. S. C. Bac. Abr. tit. *Sheriff*, N. 3. but see 9 Vin. Abr. 128. pl. 6.

^p 2 Show. 87. Comb. 17. Fost. Cr. Law, 319. Lofft. 374. Cowp. 1. *Astley & Pindar*, M. 1 Geo. III. *Id.* 7.

^q 4 Taunt. 619. 3 Bos. & Pul. 223. *sembl. contra*.

^r 1 Rol. Abr. 671.

^s 1 Ld. Raym. 725.

^t Gilb. Exec. 15. 2 Saund. 47. 2 Ld. Raym. 1075. but see 1 Maule & Sel. 711.

1 Barn. & Cres. 514. 2 Dowl. & Ry. 755. S. C.

^u 1 Vent. 7. and see 3 Stark. *Ni. Pri.* 163. where it was ruled, that if the sheriff wilfully delay to sell for an unreasonable time, with a view to injure the defendant, he is liable to an action.

^v Noy, 107. 1 Lutw. 589.

^w Cro. Eliz. 504. 2 Vent. 95.

^x Comb. 452. 1 Ld. Raym. 346.

^y Cro. Jac. 73. 1 Salk. 323. 1 Vez. 196. 1 Barn. & Ald. 230. but see *Yelv.* 44. 1 Lutw. 589.

^b 3 Campb. 521. but see 1 Stark. *Ni. Pri.* 43.

[†] 1 Bay. S. Car. Rep. 358. *accor.* In this case it was held by the three judges present, that the sheriff should make the levy at the usual and customary hours of doing business, and not at midnight, or other improper hours, unless under special circumstances.

him, not exceeding a year's rent; and also that the arrears of king's taxes, for one year, be paid to the collector. For, by the statute 8 Ann. c. 14. § 1. "no goods or chattels whatsoever, lying or being in or upon any messuage, lands or tenements, which are or shall be leased for life or lives, term of years, at will, or otherwise, shall be liable to be taken by virtue of any execution, on any pretence whatsoever, unless the party, at whose suit the said execution is sued out, shall before the removal of such goods from off the said premises, by virtue of such execution or extent, pay to the landlord of the said premises, or his bailiff, all such sum or sums of money as are or shall be due for rent for the said premises, at the time of the taking such goods or chattels, by virtue of such execution, provided the said arrears of rent do not amount to more than one year's rent; and in case the said arrears shall exceed one year's rent, then the said party, at whose suit such execution is sued out, paying the said landlord or his bailiff one year's rent, may proceed to execute his judgment, as he might have done before the making of this act; and the sheriff, or other officer, is thereby empowered and required to levy, and pay to the plaintiff, as well the money so paid for rent as the execution money: Provided always, that nothing in this act contained shall extend, or be construed to extend, to let, hinder or prejudice her majesty, her heirs or successors, in the levying, recovering or seizing any debts, fines, penalties or forfeitures, that are or shall be due, payable or answerable, to her said majesty, her heirs or successors; but that it shall and may be lawful for her majesty, her heirs and successors, to levy, recover and seize such debts, fines, penalties and forfeitures, in the same manner as if this act had never been made."^c

This statute extends to all manner of executions for the subject, upon judgment for the *defendant*, as well as the *plaintiff*.^d And [*1054] before the removal of goods under a sequestration out of the court of Chancery, the landlord is entitled to a year's rent, by the equity of the statute; for his legal remedy by distress cannot be enforced against sequestrators, any more than against receivers.^e But the king not being bound by this statute, the landlord of premises on which goods have been seized under an extent, in *chief* or in *aid*,^f is not entitled to call on the sheriff to pay him a year's rent, due before the *teste* of the writ. And where goods seized under an extent had been kept a long time by the officers on the premises, pending a reference of the prosecutor's claim, during which a subsequent arrear of rent accrued due to the landlord, the court refused to interfere in his behalf, by ordering the effects to be sold, and the rent in arrear paid to him out of the produce.^g In cases to which the statute applies, the landlord is entitled to be paid his whole rent, without deduction of poundage:^h and he may claim forehand rent, or rent stipulated by the lease to be paid in advance.ⁱ He is also entitled to be paid the rent that became due on the day the

^c § 8.^d 2 Wils. 140.^e 1 Swanst. 457.^f 2 Price, 17. and see Bunb. 5. 269.

West on Extents, 113. 4 Price, 313.

^g 6 Price, 19.^h 1 Str. 643.ⁱ 7 Price, 690.

goods were taken in execution;* which rent may be claimed, although the goods had been before distrained upon and replevied.^k But he can only claim the rent due at the time of taking the goods; and not that which accrues after the taking, and during the continuance of the sheriff in possession.^l And after he has had one year's rent paid him, he is not entitled to another upon a second execution.^m Nor is the ground landlord within the act, where there is an execution against the under-lessee.ⁿ The goods of a tenant are liable to a year's rent, notwithstanding an outlawry in a civil suit.^o And where a sheriff's officer, being in possession of the tenant's effects under an outlawry, made a distress for rent, at the instance of the landlord, and sold the goods so distrained, and afterwards the outlawry was reversed; it was ruled, that the officer was liable to pay the produce of the goods to the landlord, in an action for money had and received.^p But a commission of bankrupt is not considered as an execution within this statute; and as the landlord on the one hand may distrain for his whole rent, even after an assignment and sale by the assignees, before the goods are removed off the premises; so, on the other hand, if he suffered the goods to be removed *without distraining, he must in general come in for his rent [*1055] *pro rata* with the other creditors.^q

It is in general necessary for the landlord to give notice to the sheriff, of the rent in arrear; and it is usually given, before the removal of the goods from the premises.^r But where a sheriff, with knowledge that there is rent due to the landlord, proceeds to sell the tenant's goods, by virtue of a writ of *fieri facias*, without retaining a year's rent, he will be liable to an action, although no specific notice has been given to him by the landlord.^s And he is bound to retain a year's rent out of the proceeds of a tenant's goods taken in execution, provided he has notice of the landlord's claim, at any time while the goods or the proceeds remain in his hands; and the court, upon motion, ordered the rent to be paid to the landlord, even where the notice was given after the removal of the goods from the premises.^t If the sheriff remove the goods after notice, without satisfying the landlord, he is liable to a special action on the case for damages, on the statute; or, instead of bringing an action, the landlord may move the court out of which the execution issued, that he may be paid what is due to him, out of the money levied, if sufficient for the purpose, or otherwise so much as it will satisfy.^u The action on the statute may be brought by an executor or administrator;^v or by a trustee of an outstanding satisfied term to attend the inheritance.^w And such an action may it seems be main-

* *Ladbroke v. Wilmot*, T. 21 Geo. III. K. B.

^l 1 Maule & Sel. 245. and see 1 Price, 274.

^m 2 Str. 1024.

ⁿ *Id.* 787.

^o 7 Durnf. & East, 259. and see Bunb. 194. *accord.* but see *id.* 5. *semb. contra.*

^p 1 Atk. 103, 4. 15 East, 230.

^q 1 Str. 97. 3 Taunt. 400. And as to the

form of the notice, see 4 Moore, 473. 2 Brod. & Bing. 67. S. C. and for the manner of stating it in the declaration, see 7 Price, 566.

^r 3 Barn. & Ald. 645.

^s *Id.* 440.

^t *Cas. temp. Hardw.* 255. 2 Wils. 140. 1 Cromp. 381. Willea, 377. Barnes, 199. 211.

^u 1 Str. 212.

^v 4 Moore, 473. 2 Brod. & Bing. 67. S. C.

tained, if the sheriff remove any part of the tenant's goods, without retaining a year's rent, though other part be left on the premises.^a But if, upon the goods of a tenant being taken in execution, an agent of the landlord take from the sheriff's officer an undertaking for a year's rent, and then consent to the goods being sold, the landlord cannot afterwards maintain an action against the sheriff, for not paying him a year's rent, on making the levy, although the rent be not paid according to the undertaking, and although the undertaking be void, under the statute of frauds, for not stating any consideration.^b And an action for money had and received cannot be maintained by a landlord, to recover the amount of a year's rent against the sheriff, who has sold his tenant's goods under an execution.^c In an action [*1056] against the sheriff, ^dfor removing goods without paying a year's rent, the declaration need not state all the particulars of the demise;^e but if it do, and they are not proved as stated, the plaintiff will be nonsuited.^f In support of such an action, an existing tenancy must be proved;^g but it is sufficient for the plaintiff to prove the occupation by the tenant;^h and it lies on the defendant to shew that the rent has been paid.ⁱ

The benefit of the statute 8 Ann. c. 14. § 1. was extended, for the recovery of arrears of king's taxes, by the statute 43 Geo. III. c. 99. § 37. "which enacts, that no goods or chattels whatever, belonging to any person or persons, at the time any of the duties to be assessed under the regulations of that act became in arrear, shall be liable to be taken, by virtue of any execution, or other process, warrant or authority, or by virtue of any assignment, on any account or pretence whatever, except at the suit of the landlord for rent, unless the party at whose suit the said execution or seizure shall be sued out or made, or to whom such assignment shall be made, shall, before the sale or removal of such goods or chattels, pay or cause to be paid to the collector or collectors of the said duties so due, all arrears of the said duties, which shall be due at the time of seizing such goods or chattels, or which shall be payable for the year in which such seizure shall be made; provided the duties shall not be claimed for more than one year; and in case the said duties shall be claimed for more than one year, then the said party, at whose instance such seizure shall have been made, paying the said collector or collectors the aforesaid duties due for one whole year, may proceed in his seizure, as he might have done if no duties had been so claimed; but in case of refusal to pay the said duties, the said collector or collectors are thereby authorized and required to distrain such goods and chattels, notwithstanding such seizure or assignment, and proceed to the sale thereof according to that act, in order to obtain payment of the whole of the said duties so assessed, together with the reasonable costs and charges attending such distress and sale; and every such collector so doing, shall be indemnified by virtue of this act."

^a 4 Moore, 473. 2 Brod. & Bing. 67. S. C.

^b 3 Campb. 24.

^c *Id.* 260.

^d Doug. 665.

^e 5 Barn. & Ald. 88.

^f 7 Price, 690.

On the return day of the *fieri facias*, the sheriff may be called upon by rule, to return the writ: and if he do not return it, or offer a reasonable excuse, the courts will grant an attachment against him.^d And where the sheriff seizes goods under a *fieri facias*, and keeps possession at the defendant's desire, to enable him to pay the debt and *costs without sale; the defendant, after such pay- [*1057] ment, may, in the Common Pleas, rule the sheriff to return the writ.* But that court will not, on the motion of the defendant, compel the sheriff to give a specific return of the particulars and proceeds of goods sold under a *fieri facias*, on the ground that his officer has wasted the goods.^e And, after an action brought against the sheriff of *Chester*, for not levying under a writ of *fieri facias* issued out of the court of Great Session, the court of King's Bench refused to grant a rule for the sheriff to give the plaintiff inspection of the writ, in order to frame his declaration, although the writ was in the sheriff's possession.^f

If the property of the goods be disputed, which frequently happens on a commission of bankrupt, &c. the courts, on the suggestion of a reasonable doubt, will protect the sheriff, by enlarging the time for making his return, till the right be tried between the contending parties, or one of them has given him a sufficient indemnity.^g And accordingly, the court of King's Bench, upon the application of the sheriff, enlarged the time for his making a return to a writ of *fieri facias*, upon suggestion of a reasonable doubt, whether the goods seized under the writ were not bound by an *extent*, afterwards issued at the suit of the crown for malt duties: for the purpose of inducing the plaintiff to go into the court of Exchequer, and there contest the question of right with the crown, in a more eligible manner than in this court.^h So, where it appeared by affidavit, that writs of *extent* and *fieri facias* had been issued on the same day, the court of King's Bench, for protecting the sheriff, refused to allow a *venditioni exponas* to be issued, on the return of the *fieri facias*, to compel him to sell the goods under it.ⁱ So, where a bankrupt brought one action, and his assignees another, against the sheriff, the court allowed the latter to pay the money levied into court, and stayed the proceedings, until the trial of an issue between the bankrupt and his assignees.^j And in general, when an action is brought against the sheriff, by assignees of a bankrupt, for taking goods in execution after a bankruptcy, the courts will assist the sheriff, by *staying the proceedings until he is indemnified, on proper [*1058]

^d 1 H. Blac. 543. 1 Marsh. 344.

^e 7 Taunt. 5. 2 Marsh. 330. S. C.

^f 6 Taunt. 576. 2 Marsh. 298. S. C.

^g 1 Chit. Rep. 476. But a rule was afterwards granted in the same case, by the court of Great Session, for the plaintiff to inspect the writ.

^h *Simple v. Lord Newhaven*, M. 24 Geo. III. K. B. and see 8 Mod. 315. 1 Blac. Rep. 205. 6. 2 Blac. Rep. 1064. 1181. 3 Campb. 340. 523. 1 Stark. N. Pri. 45. 1 Chit. Rep. 294. 643. 9 Price, 54. 1 Bing.

71. The rule for this purpose must be a rule to shew cause. 1 Chit. Rep. 294. And for the form of a condition of a bond to indemnify the sheriff, for selling goods on a *fieri facias*, see Append. Chap. XLI. § 41.

ⁱ 7 Durnf. & East, 174. 1 Taunt. 120. accord.

^j 1 Chit. Rep. 643. (a.) and see 2 Chit. Rep. 390. 1 Gow, 39. 1 Brod. & Bing. 370. S. C.

^k *Jones v. Perry*, T. 21. Geo. III. K. B.

and equitable terms:^m and the terms imposed by the court of King's Bench in a late caseⁿ were, the sheriff's paying over the money levied to the assignees, with the costs of the action up to that time, being allowed his poundage, and expenses incurred in the execution.

The returns commonly made by the sheriff to a *feri facias*, are first, *feri feci*, or that the sheriff has caused to be made of the defendant's goods, the whole or a part of the debt, &c. which he has ready to be paid to the plaintiff;^o secondly, that he has taken goods of the defendant, to a certain amount, which remain in his hands unsold for want of buyers;^p thirdly, *nulla bona*,^q which is either general, that the defendant has no goods in his bailiwick, whereof he can cause to be made the sum directed to be levied, or any part thereof; or special, with this addition, that the defendant is a benefited clerk, having no lay fee within his bailiwick;^r or, being an executor or administrator, that he has wasted the goods of the testator or intestate;^s fourthly, that the sheriff has made his mandate to the bailiff of a liberty, who has given him no answer, or returned *nulla bona*,^t &c.

If *feri feci* be returned, the plaintiff may proceed against the sheriff for the money, by rule of court, or action of *debt* founded on his return; or by action of *assumpsit* for money had and received: and the latter action is maintainable, without making any previous demand of payment.^u Or, though no return be made, an action of *debt*, *account*, or *assumpsit*, will still lie against the sheriff, or his executors, for the money levied.^v And in such an action, the defendant cannot plead the statute of limitations; for though, till the writ be returned, it is not a matter of record, yet it is founded upon a record, and has a strong relation to it.^w But where the sheriff by mistake returned to a *feri facias*, that he had money in his hands, ready to be paid over to the plaintiffs, whereas it had been paid over, through the misconduct of his officer, to the solicitor of a commission of bankrupt issued against the defendant, (the original debtor,) under which commission one of the plaintiffs was appointed assignee, who knew of and did not object to such payment; the court of Common Pleas held, that this amounted to an assent on the part [*1059] of such *plaintiff, to ratify the payment, and consequently that the sheriff was not liable to pay over to the plaintiffs, the sum which he stated in his return to have received for them.^x So, where the plaintiff had appointed a special bailiff and agent, to manage the sale of goods under a *feri facias*, it was holden that the sheriff was discharged; although, on being ruled to return the writ, he returned that he had sold, and that he had made deductions, which he had no

^m 4 Taunt. 585. 7 Taunt. 294. 1 Moore, 43. S. C. 1 Chit. Rep. 577. *Id.* 643. (a). 2 Chit. Rep. 204. 4 Moore, 339. but see 1 East, 338. 3 Bos. & Pul. 288. *Ante*, 1047.

ⁿ 1 Chit. Rep. 577. and see *id.* 643. (a).

^o Append. Chap. XLI. § 42. 44.

^p *Id.* § 47. 8.

^q *Id.* § 49. 51.

^r Append. Chap. XLI. § 50.

^s *Thes. Brev.* 116, 17. Append. Chap. XLI. § 52.

^t Append. Chap. XLI. § 43. 46.

^u 3 Campb. 347.

^v Cro. Car. 539. 2 Show. 79. 281. Gilb. Exec. 25.

^w 2 Show. 79.

^x 4 Moore, 606. 2 Brod. & Bing. 77. S. C.

right to make in point of law.^a And, in an action brought against the sheriff for money levied under a *feri facias*, without any previous demand, the court of King's Bench stayed the proceedings, upon payment of the sum levied, without costs.^b The sheriff's return to a writ of *feri facias*, that he has levied the money, is not sufficient evidence to prove that he has paid it over to the judgment creditor, so as to charge the latter with the receipt of it, in an action for money had and received.^c

When the sheriff has taken the defendant's goods upon a *feri facias*, to the amount of the sum directed to be levied, the defendant is discharged, and may plead it in bar to an action of *debt*, or *scire facias* upon the judgment.^d But where two persons are jointly and severally bound, and execution is had against one of them, and his goods are seized, but not sold, this cannot be pleaded in an action of *debt* against the other obligor; because it is no actual satisfaction.^e

If part of the money only be levied, the plaintiff may have a *feri facias*,^f *capias ad satisfaciendum*,^g or *elegit*,^h for the residue: Or he may bring an action on the judgment for the residue, wherein the defendant may be arrested, if he was not arrested in the original action.ⁱ But the first writ must be returned, before a second execution can be taken out;^k for that must be grounded on the first writ, and recite that all the money was not levied thereon: though if upon the first, all the money had been levied, the writ need not have been returned, for no further process was necessary;^l and if nothing be levied on the first writ, it need not be recited in the second.^m

If the sheriff return that he has taken goods, which remain in his hands unsold for want of buyers, the plaintiff may sue out a writ of *venditioni exponas*, reciting the former writ and return, [*1060] and commanding the sheriff to expose the goods to sale, and have the monies arising therefrom in court, at the return of it;ⁿ or, if goods are not taken to the value of the whole, the plaintiff may have a *venditioni exponas* for part, and a *feri facias* for the residue, in the same writ.^o And it is said, that if a sheriff seize goods to the value, and return it, he is bound to find buyers.^p But where it appeared by affidavit, that writs of *extent* and *feri facias*, had been issued on the same day, the court of King's Bench, we have seen,^q refused to allow a *venditioni exponas* to be issued, on the return of the *feri facias*, to compel the sheriff to sell the goods

^a *Pallister v. Pallister*, H. 56 Geo. III.
K. B. 1 Chit. Rep. 614. *in notis*.

^b 3 Barn. & Ald. 696.

^c 1 Maule & Sel. 599.

^d 2 Ld. Raym. 1072. 1 Salk. 322. 8. C. Bac. Abr. tit. *Execution*, D.

^e *Id. ibid.* 2 Show. 394.

^f Append. Chap. XLI. § 53, 4.

^g *Id.* § 86, 7.

^h *Id.* § 110, 11.

ⁱ 1 New Rep. C. P. 133. 2 Smith R. 39. S. C.

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^k Barnes, 213. 2 Chit. Rep. 203. *Ante*, 1033.

^l 1 Salk. 318. Gilb. *Exec.* 26.

^m 1 Kenyon, 120. 9 Price, 5.

ⁿ Append. Chap. XLI. § 55. Cowp. 406.

^o *Thes. Brev.* 305. Append. Chap. XLI. § 56. And see further, as to the writ of *venditioni exponas*, 2 Saund. 47. l. (2.)

^p *Per Holt*, Ch. J. 6 Mod. 293. 2 Ld. Raym. 1075. S. C.

^q *Ante*, 1057. and see 2 Chit. Rep. 390.

under it. And the court of Common Pleas refused to grant an attachment against the sheriff, because he had returned to a writ of *venditioni exponas*, that part of the goods levied remained in his hands, for want of purchasers.¹ A sheriff having returned a levy under a writ of *feri facias*, cannot return to a *venditioni exponas*, that he has sold the goods, but detains the money for another plaintiff, under a prior writ of execution; and the court of Exchequer quashed such return on motion, and would not give the sheriff leave to amend it.² But where, on a writ of *venditioni exponas* for goods already taken in execution, with a clause of *feri facias* for the residue, the sheriff returned that he had made a certain sum of the said goods, but omitted by mistake to return *nulla bona* to the *feri facias*, the court of Common Pleas allowed the sheriff to amend the return, and set aside an attachment issued against him for not making it.³

When the old sheriff returns that he has taken goods, which remain in his hands for want of buyers, the usual way of proceeding, in the King's Bench, is by writ of *distringas* to the new sheriff, commanding him to distrain the old one, till he sell the goods,⁴ &c. Of this writ there are two sorts; the first, which is the more ancient, commands the sheriff to whom it is directed, to distrain the late sheriff, so that he expose the goods to sale,⁵ and cause the monies arising therefrom to be delivered to the present sheriff, in order that such sheriff may have those monies in court, at the return.⁶ The other writ, which is the most usual,⁷ is to distrain the late sheriff, to [*1061] sell the goods, and have the money in court himself.⁸ And when there has been collusion between the defendant and the sheriff, the court will not prevent the plaintiff from proceeding at the same time by action for a false return, and by *distringas* against the late sheriff, to make a return to a *venditioni exponas*.⁹ But where the sheriffs of London, having taken the defendant's goods in execution under a writ of *feri facias*, were ruled, on the 8th of February 1811, to return the writ; and returned on the 11th, that they had the goods in hand for want of buyers; after which the plaintiff, without issuing a writ of *venditioni exponas*, lay by till a commission of bankrupt issued against the defendant, founded on an act of bankruptcy prior to the execution, and till after the then sheriffs had delivered up the goods to the assignees of the bankrupt on the 16th of March, and had gone out of office in September following; and then in January, 1812, issued a writ of *distringas* to the present sheriffs, to distrain the late sheriffs, for not selling the goods; the court of King's Bench, under these circumstances, set aside the last-mentioned writ, leaving the plaintiff to his remedy by action, if the commission were fraudulent, as alleged by him.¹⁰ So where the

¹ 1 Bos. & Pul. 359. and see 4 Moore, 339.

² 9 Price, 317.

³ 1 Marsh. 344. *Ante*, 1037, 8.

⁴ Append. Chap. XLI. § 58, 9.

⁵ Gilb. *Exec.* 21.

⁶ 34 Hen. VI. 36.

⁷ 6 Mod. 299.

⁸ Rast. 164. *Thes. Brev.* 90. *Off. Brev.*

45. Append. Chap. XLI. § 58, 9. 2 Ld.

Raym. 1074, 5 1 Salk. 323. S. C. 2 Saund.

47. l. (2.)

⁹ 2 Chit. Rep. 392.

¹⁰ 15 East, 78.

sheriff, in *Michaelmas* term, returned to a writ of *feri facias*, "goods in hand for want of buyers, value unknown," and no further steps were taken by the plaintiff till *Trinity* term following, and in the mean time the goods were seized under an *extent* by the crown; the court would not compel the sheriff to make good the loss to the plaintiff, but quashed a writ of *distringas* which had been issued for that purpose, although the plaintiff had given all the indulgence, with the advice and concurrence of the sheriff's officer.^d On an *alias distringas* against the late sheriff, for not selling goods on a *venditioni exponas*, the court ordered the issues to be increased to the amount of the debt, and costs subsequently incurred.*

The return of *nulla bona* is proper, when the defendant has no goods or chattels in the bailiwick of the sheriff, whereof he can cause to be made the debt and costs, or damages recovered; but when the defendant has goods, though the sheriff is prevented from taking them by the allowance of a writ of error, he should not return *nulla bona*, but the fact of a writ of error having been sued out and allowed, as an excuse for not taking them.^f If the sheriff return, on a **feri facias*, that the defendant has no goods [*1062] in his bailiwick, the plaintiff, if it be true, may have another writ of *feri facias* into the same county, or a *testatum feri facias* into a different county, suggesting that the defendant has goods there;^g which latter writ may be awarded into *Wales*, or a county *palatine*.^h Or the plaintiff, in that case, may sue out a *capias ad satisfaciendum*,ⁱ or *elegit*: And a *testatum feri facias* may be either for the whole, or, on the return of a partial levy, for the residue.^k In any of these writs, there may be a clause of *non omittas*,^l commanding the sheriff, that he do not omit, on account of any liberty in his county, but that he enter the same, &c.: which clause may be inserted in the first process.^m If the return be not true, the plaintiff may maintain an action against the sheriff, for a false return; in which action, the sheriff cannot go into circumstantial evidence to impeach the judgment, on the ground of a collateral fraud:ⁿ And when the sheriff returns *nulla bona*, and there is a recovery against him for his false return, that vests no property of the goods in him or the plaintiff; but they remain in the defendant, and are liable to a subsequent execution for his debt.^o But an action on the case does not lie against the sheriff, who has not been ruled to return the writ, for neglecting to have the money in court, according to the exigency of a *feri facias*.^p

The plaintiff cannot regularly sue out a *feri facias* into a different county from that where the action is laid, without a *testatum*,^q

^d 3 Barn. & Ald. 204. 1 Chit. Rep. 613.
S. C.

^e 4 Barn. & Ald. 652.

^f 3 Moore, 83. 1 Gow, 66. S. C.

^g Append. Chap. XLI. § 60, 61.

^h Cro. Jac. 484. and see 1 Lev. 256. 291.

ⁱ T. Raym. 206. 2 Saund. 193. 194. a. (2.)
R. H. 19 Jac. I. K. B. Append. Chap. XLI. § 63, 4, 5.

^j Append. Chap. XLI. § 28.

^k Id. § 66, 7, 8.

^l Id. § 40.

^m Anle, *168.

ⁿ 2 Stark. Ni. Pri. 218.

^o 2 Vern. 239.

^p 1 Stark. Ni. Pri. 388.

^q 2 Blac. Rep. 694. *Palter & Ellison*,
H. 25 Geo. III. K. B. 3 Durnf. & East,
667.

nor a *testatum*, without a previous *feri facias*.⁷ But the award of a *testatum* on the roll, is sufficient to warrant a *feri facias* into a different county:⁸ or if a *feri facias* be sued out into one county, when it should have been a *testatum*, without any original *feri facias*, and the plaintiff afterwards sue out an original *feri facias*, the court will permit the party to amend the former writ, by making it a *testatum*, on payment of costs;⁹ and they will not set aside a *testatum*, sued out without an original *feri facias* to warrant it, if the plaintiff afterwards sue out such original *feri facias*, [*1063] and get it returned and filed, so as to be able to produce it on shewing cause,¹⁰ though a writ of error has been previously brought.¹¹ So, where the record was produced in court, on which an original *capias ad satisfaciendum* was entered, with the sheriff's return thereto, the court of King's Bench permitted the plaintiff to sue out and seal an original *capias ad satisfaciendum*, to warrant a *testatum* into a different county.¹² And in that court, it is said that the *feri facias*, on which the *testatum* is founded, is returned of course by the attorneys themselves, as originals are.¹³ In all continued writs, the *alias* or *testatum* must be tested the day the former was returnable;¹⁴ and if a *feri facias* issue to the sheriff, returnable on a general return day, and he at that day return *nulla bona*, a *testatum* may issue on the day following, and execution thereon will be good; for though, on mesne process, there can be no *testatum* till the *quarto die post*, yet it is otherwise in writs of execution, for on these the party has no day in court.¹⁵

If the sheriff return *nulla bona*, and the defendant is a beneficed clerk, having no lay fee, there goes a *feri* or *levari facias* to the bishop of the diocese wherein the benefice is, commanding him to make or levy the sum recovered, of the *ecclesiastical* goods and chattels of the defendant.¹⁶ This writ is similar to a common *feri facias*; and the bishop, who is in nature of a temporal officer or ecclesiastical sheriff, may seize and sell the profits of the benefice.¹⁷ But he must return *feri* or *levari feci*, and not *sequestrari feci*, upon this writ.¹⁸ He may also, like the sheriff, be called on by rule to return the writ;¹⁹ and if he make a false return, will be liable to an action.²⁰ Upon this writ, the bishop or his officer makes out a

⁷ 3 Durnf. & East, 388.

⁸ Barnes, 196, 7. and see Prac. Reg. 210. 212. Append. Chap. XLI. § 27. 62. It is not sufficient, however, to verify the fact of an original *feri facias* having been awarded, by affidavit; but the plaintiff ought to have the roll in court. *Per Cur. M. 42 Geo. III. K. B.*

⁹ 3 Durnf. & East, 657. 1 H. Blac. 541. *Ante*, 1037.

¹⁰ 2 Salk. 589, 90. Barnes, 200, 201. 208, 9. 211. 3 Durnf. & East, 388. 657. but see 7 East, 296. *Ante*, 1034.

¹¹ 5 Durnf. & East, 272.

¹² 6 Durnf. & East, 450, Append. Chap. XLI. § 97.

¹³ 2 Salk. 590.

¹⁴ *Id.* 699. *Ante*, 173.

¹⁵ T. Jon. 200.

¹⁶ Gilb. Exec. 26. Bac. Abr. tit. *Execution*, 360. Append. Chap. XLI. § 69, &c. For the history of this writ, and what may be taken under it, see 3 Bos. & Pul. 326. *per Alcanley*, Ch. J. Or, instead of a *feri* or *levari facias de bonis ecclesiasticis*, a *sequestrari facias* may be issued; for which see Append. Chap. XLI. § 72.

¹⁷ 1 Mod. 260. 2 Mod. 257, 8. 1 Freem. 230. S. C.

¹⁸ 1 Str. 87.

¹⁹ 1 Sid. 276. Gilb. Exec. 26. and see 1 Salk. 320. 1 Ld. Raym. 265. 8. C.

sequestration,^a directed to the churchwardens, or, upon proper security, to persons of the plaintiff's own appointment, requiring them to sequester the tithes, and other profits of the benefice; which sequestration should be forthwith duly published, by reading it in church during divine service, and afterwards at the church door, and fixing a copy ^athereon; for where a sequestration was [*1064] made out, and not published while the writ was in force, but was stayed in the register's hands, by desire of the plaintiff's attorney, the court held that it had no priority, as against other sequestrations, afterwards made out and duly published; but that if it had been published, the execution would have taken effect, and must have been first satisfied, notwithstanding it was then returnable.^b The writ of *fieri* or *levari facias de bonis ecclesiasticis* is a continuing execution; and if the sequestration issue and be published before the writ is returnable, it is sufficient; and the plaintiff is entitled to the growing profits from time to time, though long after it is returnable, until he is satisfied the sum indorsed on the writ.^c Yet, if it be actually returned, the authority of the bishop is at an end: Therefore, where such a writ remained in the hands of the bishop long after it was returnable, who sequestered the profits of the vicarage, accruing as well before the return day as after, and being ruled to return the writ, returned only the amount of sum levied up to the return day, the court of Common Pleas would not order the writ and return to be taken off the file; but would only permit the return to be amended, by inserting the sum levied up to the time when the writ was actually returned.^d The proper way would have been, to have ruled the bishop from time to time, to know what he had levied.^e When a bishop grants a sequestration against the effects of a clergyman within his diocese, he stands in the same situation as a sheriff; and the court has the same power over him as over that officer: Therefore, where four writs of sequestration had issued against the effects of a clergyman at the same time, by the same attorney, at the suit of different persons, and they had been entered so as to postpone the execution of the plaintiff, who was entitled to priority, the court ordered the bishop to return what he had levied, and give precedence to the writ issued at the suit of the plaintiff.^f

In an action against an *executor* or *administrator*, if the sheriff return *nulla bona* to the *fieri facias*, the plaintiff must proceed by *scire fieri* inquiry,^g or action of *debt* upon the judgment, suggesting a *devastavit*: but if a *devastavit* be returned by the sheriff, the plaintiff may have execution immediately against the defendant, by *fieri facias de bonis propriis*,^h or *capias ad satisfaciendum*.ⁱ

^aIf the sheriff return, that he has made his mandate to the [*1065]

^a Burn's *Eccles. Law*, tit. *Sequestration*, 3 V. 317. Append. Chap. XLI. § 75.

^b Burn's *Eccles. Law*, tit. *Sequestration*, 3 V. 317. *Legassick v. Bishop of Exeter*, E. 22 Geo. III. 1 Crompt. 359. 2 H. Blac. 582. but see Wood's Inst. 608, 9. 1 Crompt. 345. *semb. contra*.
^c 2 H. Blac. 582.

^d *Id.* 583.

^e 1 Dowl. & Ry. 486.

^f Lil. Ent. 664. Append. Chap. XLIII.

^g 84.

^h *Thes. Brev.* 46, 7. 122. 125. Append. Chap. XLI. § 76, 7.

ⁱ Append. Chap. XLI. § 98.

bailiff of a liberty, who has given him no answer, the bailiff may be called upon by rule, to return the mandate;^p and if he do not return it, will be liable to an attachment: Or if he return *nulla bona*, &c. the plaintiff may proceed thereon, in like manner as if the sheriff had returned it: And if the bailiff make an *insufficient* return, he is liable to be amerced for it, and not the sheriff, by the statute 27 Hen. VIII. c. 24.^q

After a *feri facias*, if the plaintiff be not satisfied, he may have a *capias ad satisfaciendum*, against the person of the defendant, or an *elegit*, against his goods and a moiety of his lands; or he may sue out either of these writs in the first instance.

It has been said, that where judgment is given against one who is in view of the court, or in *Westminster* hall, it may be executed immediately, and the party taken or sent for into court and committed.^r This however is a case that can scarcely occur in *civil* actions, wherein the judgment is not given in court, but signed, on taxing costs, in the king's bench or prothonotaries office. The usual mode therefore, of executing a judgment against the person of the defendant, is by writ of *capias ad satisfaciendum*: And when he is at large, it commands the sheriff, or other officer to whom it is directed, to take the defendant, and him safely keep, so that he may have his body in court, on the return day, to satisfy the plaintiff.^s When the defendant is already in custody, there is no occasion for this writ; but if the plaintiff would proceed against his body, he must charge him in execution, as directed in a former chapter.^t

The process of *capias* after judgment is not given by the express words of any statute, but arises by consequence of law; it being a rule, that whenever a *capias* is allowed on *mesne* process before judgment, it may be had upon the judgment itself.^u This process therefore lies after judgment, in every instance where the defendant was subject to a *capias* before;^v and it may be taken out against the defendant sued by a wrong name, if he has omitted to take advantage of the misnomer;^w but it lies not against *peers*, or *members* of the House of Commons, except upon a statute merchant or statute [*1066] staple;^x or recognizance in nature of a statute staple;^y nor against *ambassadors*, and other public ministers, or their domestic servants;^z nor the servants in ordinary of the *king*, or *queen* regent;^a nor against members of *corporations* aggregate, or *hundredors*, for any thing done in their corporate capacity, or under the statutes of hue and cry,^c &c. Neither does it lie against an *heir*, on a *special* judgment, for the debt of his ancestor, to be levied of the lands descended;^d nor against *executors* or *administrators*, unless a *devas-*

^p 2 Durnf. & East, 5.

^q Gilb. C. P. 30. 2 Durnf. & East, 12.

^r 3 Salk. 160.

^s Append. Chap. XLI. § 78, &c.

^t Chap. XV. p. 367, &c.

^u 3 Salk. 286.

^v 3 Co. 12.

^w 2 Str. 1218. *Ante*, *458.

^x 2 Leon. 173, 4. 1 Crompt. 345.

^y *Ante*, *216.

^z *Id.* 215.

^a *Id.* *218.

^c 2 Wms. Saund. 7. (4). *Ante*, 971.

tavit be returned.* And by the statute 57 Geo. III. c. 99. § 47. "no penalty or costs incurred by any *spiritual* person, by reason of any non-residence on his benefice, shall be levied by execution against the body of any such person, whilst he shall hold the same, or any other benefice, out of the profits of which the same can be levied by sequestration, within the term of *three* years; and in case the body of any such spiritual person shall be taken in execution for the same, the court in which the same was recovered, or any judge thereof, may and shall, upon application made for that purpose, discharge the party from such execution, in case it shall be made appear, to the satisfaction of such court or judge, that such penalty and costs can be levied as aforesaid."

An *infant* seems to be liable to this process;† and it may be taken out against *bail*, in the King's Bench, without any previous *fiery facias*, or return of *nulla bona*;‡ but in the Common Pleas, or Exchequer, &c. the bail are not subject to a *capias*;§ nor does it lie on a common law recognizance,¹ or recognizance taken in the King's Bench, on bringing a writ of error;¹ nor for damages, against tenant in dower,² &c. After interlocutory judgment against a *feme* upon a contract, she married; and the court held, that the plaintiff might proceed to judgment and execution against her, without joining the husband by *scire facias*: and a *capias ad satisfaciendum* against her, following the judgment, was at all events regular, though the plaintiff had notice of the marriage before.¹ In an action against *husband and wife*, they may both be taken in execution: and when the wife is taken in execution, she shall not be discharged; unless it appear that she has no separate property; out of which the demand can be satisfied,³ or that there is fraud and collusion between the plaintiff and her husband, to keep her in prison.⁴ It should also be remembered, that volunteer *soldiers* and *seamen* are not liable to be taken in execution, unless an affidavit be made, that the original debt, in the case of *soldiers*, amounted to 20*l.* at least, over and above all costs of suit,⁵ or, in the case of *seamen*, that the debt or damage and costs are of that amount; and that the debt was contracted when the defendant did not belong to any ship in his majesty's service:⁶ And when a *capias ad satisfaciendum* lies, it cannot, we have seen, be executed upon parties coming to, attending upon, or returning from courts of justice;⁷ nor at the time⁸ or place,⁹ when and where they are privileged from arrest.

In point of form, the *capias ad satisfaciendum* must pursue the judgment:¹ therefore, on a judgment against several defendants, it

* 3 Blac. Com. 414.

† 2 Str. 1217. and see *id.* 708. 1 Bos. & Pul. 480.

‡ 2 Str. 822. 1139.

§ 2 Taunt. 113, 14. 2 Marsh. 186. *Id.* 187. (a). *Post*, Chap. XLIII.

¹ Gilb. *Exec.* 69. Bing. *Exec.* 106, 7.

² Gilb. *Exec.* 6. Bing. *Exec.* 107.

³ 4 East, 521.

⁴ *Chalk v. Deacon & wife*, T. 2 Geo. IV. C. P. 6 Moore, 128. and see 5 Barn. &

Ald. 759. *Ante*, 219, 20.

⁵ 2 Str. 1167. 1237. 1 Wils. 149. K. B. Barnes, 203. 3 Wils. 124. 2 Blac. Rep. 720. S. C. C. P. *Ante*, 219, 20.

⁶ *Ante*, *225.

⁷ *Id.* *Ibid.*

⁸ *Id.* *221.

⁹ *Id.* *239.

¹⁰ *Id.* 240.

¹¹ *Philpot v. Muller and another*, T. 23 Geo. II. K. B.

must include them all.^a If part of the demand has been already levied under a *feri facias*, the *capias ad satisfaciendum* is only for the residue.² And it may be sued out against executors or administrators, after a *devastavit* returned.⁷ This writ should be directed to the sheriff of the county where the action is laid, or to the proper officer for executing it, in a county palatine; and it need only be sealed in the King's Bench,² but, in the Common Pleas, it must be signed, as well as sealed;⁴ and it must be tested and returnable in term time, in like manner as the *feri facias*.^b It was formerly necessary that there should be *fifteen* days at least between the *teste* and return of the *feri facias* and *capias ad satisfaciendum* by *original*: but as that occasioned great delay, it was enacted by the statute 13 Car. II. stat. 2. c. 2. § 6. that "in all actions of *debt*, and other *personal* actions, and also in all actions of *ejectment*, depending by *original* writ in the courts of King's Bench and Common Pleas, after any judgment obtained therein, there need not be fifteen days between the *teste* and return of any writ of *feri facias* or *capias ad satisfaciendum*; nor shall the want thereof be assigned for error." This statute, however, does not extend to any writ of *capias ad satisfaciendum*, whereon a writ of [*1068] *exigent* after judgment is to be awarded; nor to any *capias ad satisfaciendum* against the defendant, in order to make his bail liable. The *capias ad satisfaciendum* should regularly be returnable on a *general* return day, or day *certain*, in like manner as the former proceedings;⁶ and for the purpose of charging the bail, there out to be *eight* days between the *teste* and return by *bill*,^d and *fifteen* by *original*.^c but a *capias ad satisfaciendum* returnable out of term, is not void as against the bail, though it may be set aside by the principal on motion, for irregularity;^e and there may be an intervening term, between the *teste* and return of this writ.⁵ The *capias ad satisfaciendum* may be amended by the judgment, in the names of the parties,^h if mistaken, or in the amount of the sum recovered,ⁱ &c.; or by the award of execution on the roll, when the writ is made returnable on a *general* instead of a *particular* return day,^k or, in the Common Pleas, "before us at *Westminster*," instead of before our justices,⁷¹ &c.

The common returns to a writ of *capias ad satisfaciendum* are, that the sheriff has taken the defendant, whose body he has ready;^m or that the defendant is not found in his bailiwick:ⁿ Or the sheriff

^a 6 Durnf. & East, 526, 7.

² Append. Chap. XLI. § 86, 7.

⁷ *Id.* § 88.

² Imp. K. B. 444. R. E. 1659. K. B.

contra.

² Imp. C. P. 491,

^b *Ante*, 1036, 7.

^c But where an attorney, having sued by attachment of privilege, was nonsuited, and afterwards taken upon a *ca. ca.* returnable on a general return, the court of Common Pleas held it to be well enough. 3 Wils. 58.

^d 2 Salk. 602.

⁵ 13 Car. II. stat. 2. c. 2. § 6.

⁷ 2 Bur. 1188.

² 2 Salk. 700. 2 Ld. Raym. 775. S. C.

^b Barnes, 10, 11. 4 Taunt. 322.

¹² Durnf. & East, 737. 5 Durnf. & East, 577. 6 Durnf. & East, 450. 8 Durnf. & East, 416. (a.) 1 Chit. Rep. 349. *Ante*, 770.

² 2 Blac. Rep. 836. and see 2 Bos. & Pul. 336.

¹ 3 Wils. 58. and see 1 Marsh. 237. *Ante*, 1037.

^m Append. Chap. XLI. § 91.

ⁿ *Id.* § 92.

may return that he has made his mandate to the bailiff of a liberty, who has given him no answer, or has returned *cepi corpus*, or *non est inventus*,^a or that the defendant has become bankrupt, and obtained his certificate, wherefore he forbore to take him.[†] On the return of *non est inventus*, the plaintiff may sue out another *capias* into the same, or a *testatum*^a into a different county; or he may have a *non omittas capias ad satisfaciendum* into either.^a And as the defendant can only be once taken, it seems there may be several writs running against him at the same time, in different counties.^a Or, instead of suing out another *capias* or *testatum*, the plaintiff may, if the action was commenced by original writ, proceed at once to outlaw the defendant, by suing out an *exigi facias*,^a and process of outlawry.^a

*The defendant being taken upon a *capias ad satisfaciendum*, [*1069] either satisfies the plaintiff's demand, or remains in custody. The sheriff, however, hath it seems no power to receive money of the defendant, upon a *capias ad satisfaciendum*; for his business is only to execute the writ; and if in such case the defendant pay the sheriff, and he afterwards become insolvent, and do not pay the plaintiff, such payment shall not excuse the defendant.^a And accordingly, upon the execution of a writ *capias ad satisfaciendum*, issuing out of the King's Bench, which requires the sheriff to take and keep the body, so that he may have it on the return day of the writ at *Westminster*, to satisfy the plaintiffs of their damages, costs and charges, if the sheriff, before the return day, receive the money due from his prisoner, and thereupon liberate him, before he has paid it over in satisfaction to the party entitled to it, he is answerable as for an escape;^a and his return, under the common rule, of *cepi corpus*, and that he detained the prisoner until he satisfied him, (the sheriff,) the levy money indorsed on the writ, which he had ready as commanded, &c. is of no avail.^a If the plaintiff appoint a special bailiff, or give particular directions to the officer with regard to the receipt of money on an execution, he thereby discharges the sheriff; and if the sheriff afterwards return that he has paid over the money to the plaintiff, he is not liable to an action for a false return.^a

If the defendant, being taken in execution, do not satisfy the plaintiff, he either remains in custody of the sheriff, who may carry him immediately to the county gaol,^a or is removed by *habeas corpus*, to the King's Bench or Fleet prison. In either case, the

^a Append. Chap. XLI. § 94.

^a *Id.* § 93.

^a *Id.* § 96, &c. but see 4 Taunt. 631.

^a *Id.* § 95.

^a *Ante*, 1033.

^a Append. Chap. XLI. § 102.

^a *Ante*, *150.

^a 12 Mod. 230. *per Holt*, Ch. J. and see

1 Lutw. 587. 12 Mod. 385. Freem. 482.

Barnes, 214. Bac. Abr. tit. *Execution*, D.

^a 14 East, 468.

^a *Porter v. Viner*, M. 56 Geo. III. K. B.

1 Chit. Rep. 613. (*a.*) *Ante*, 1059.

^a 4 Durnf. & East, 555. *Ante*, 239, 30.

† Or, that he has taken the defendant, who is dead; and this return is sufficient without saying where the defendant died. 1 *Hur. & M'Hen. Rep.* 540.

execution is considered, *quoad* him, as a satisfaction of the debt:^b Therefore a judgment creditor, who has taken his debtor in execution, cannot afterwards sue out a commission of bankrupt against him upon the same debt;^c nor set off the sum recovered, in an action brought by the debtor, for a cross demand:^d and if the plaintiff, having the defendant in execution, consent to his discharge, though it be on terms which are not afterwards complied with,^e or upon [*1070] giving a fresh *security, which afterwards become ineffectual,^f the plaintiff cannot resort to the judgment again, or charge the defendant's person in execution; even though he were discharged the first time by the plaintiff's consent, upon an express undertaking that he should be liable to be taken in execution again, if he failed to comply with the terms agreed on.^g But a *capias ad satisfaciendum* is no actual satisfaction, so as to bar the plaintiff from taking out execution against other persons, liable to the same debt or damages:^h And where a defendant, having been taken under an attachment for non-payment of money pursuant to an award, was discharged by the sheriff, on his consenting to return into custody, the court, on his refusal to do so, granted an *alias* attachment against him.ⁱ If the plaintiff consent to discharge one of several defendants, taken on a joint *capias ad satisfaciendum*, he cannot afterwards retake him, or take any of the other defendants.^k And where the plaintiff obtained a verdict in *trespass* against two defendants, both of whom were arrested on a joint *capias ad satisfaciendum*, and one was discharged, on giving a promissory note to the plaintiff, the court of Common Pleas held, that this operated to discharge the other.^l But if one of two defendants, taken on a joint writ, be discharged under an insolvent debtor's act, that will not operate as a discharge of the other; the discharge of the former not being with the actual consent of the plaintiff.^m

It was formerly doubted whether, if a person were taken in execution, and set at liberty by privilege of either house of parliament, the party at whose suit such execution was pursued, was for ever after barred and disabled from suing forth a new writ of execution: For the avoiding of any further doubt in which case, it is enacted by the statute 2 Jac. I. c. 13. § 2. that "the party at whose suit such writ of execution was pursued, his executors or administrators,

^b Hob. 59.

^c 8 Durnf. & East, 123. and see 1 Str. 653. 3 Wils. 271. *accord*. But the courts have no power to discharge the defendant out of execution, on the ground of a commission of bankrupt having since been sued out against him by the plaintiff. 1 Bos. & Pul. 302.

^d 5 Maule & Sel. 103. 2 Chit. Rep. 303. S. C. but see 1 Taunt. 426. 1 Maule & Sel. 696. *semb. contra*. 6 Taunt. 176.

^e 4 Bur. 2482. 6 Durnf. & East, 526, 7. 7 Durnf. & East, 420.

^f 1 Durnf. & East, 357.

^g 2 East, 243. Barnes, 205. But see the statute 41 Geo. III. c. 64. by which any

creditor, at whose suit a debtor was charged in execution, might have consented to his discharge, without losing the benefit of the judgment upon which the execution issued, except that the person of the debtor was not to be again liable to an arrest for the same debt, nor the bail to be proceeded against. This statute being made to continue in force only for *three* years, is now expired.

^h Hob. 59. and see 5 Taunt. 614. 1 Marsh. 250. S. C.

ⁱ *Good v. Wilks*, T. 57 Geo. III. K. B.

^k 6 Durnf. & East, 525.

^l 2 Moore, 235.

^m 5 East, 147.

after such time as the privilege of that session of parliament in which such privilege shall be so granted shall cease, may sue forth and execute a new writ or writs of execution, *in such manner [*1071] and form as by the law of this realm he or they might have done, if no such former execution had been taken forth or served."

If a person taken on a *capias ad satisfaciendum* died in execution, it was formerly holden that the plaintiff had no further remedy; because he had determined his choice by this kind of execution, which, affecting a man's liberty, is esteemed the highest and most rigid in the law.^a But now, by the statute 21 Jac. I. c. 24. reciting, that forasmuch as daily experience doth manifest, that divers persons of sufficiency in real and personal estate, minding to deceive others of their just debts, for which they stood charged in execution, have obstinately and wilfully chosen rather to live and die in prison, than to make any satisfaction according to their abilities; to prevent which deceit, and for the avoiding of such doubts and questions, it is declared, explained and enacted, "that the party or parties at whose suit, or to whom any person shall stand charged in execution, for any debt or damages recovered, his or their executors or administrators, may after the death of the person so charged and dying in execution, lawfully sue forth and have new execution, against the lands and tenements, goods and chattels, or any of them, of the person so deceased, in such manner and form, to all intents and purposes, as he or they or any of them might have had, by the laws and statutes of this realm, if such person so deceased had never been taken or charged in execution."

"Provided, that this act shall not extend to give liberty to any person or persons, their executors or administrators, at whose suit or suits any such party shall be and die in execution, to have or take any new execution, against any lands, tenements or hereditaments, of such party so dying in execution, which shall at any time after the said judgment or judgments, be by him sold *bonâ fide*, for the payment of any of his creditors, and the money which shall be paid for the lands so sold, either paid or secured to be paid to any of his creditors, with their privity and consent in discharge of his or their due debts, or of some part thereof."^o

If a party taken on a *capias ad satisfaciendum* escape, or be rescued, though the sheriff is thereby liable, because he ought to have taken the *posse comitatus*, yet the plaintiff may sue out a new execution; and shall not be compelled to take his remedy against the sheriff, who may be dead or insolvent.^p Or, if the defendant escape from the *King's Bench or Fleet Prison, the plaintiff [*1072] on application to a judge, may have an escape warrant, in order to retake him, which shall be in force throughout *England*.^q

If the writ of execution be *irregular*, the defendant may move the court to set it aside,^r and discharge him out of custody, if taken on a *capias ad satisfaciendum*, &c.; or that the goods or money

^a Hob. 52. 6 Durnf. & East, 526.

^o And see the statute 47 Geo. III. sess. 2. c. 75. "for more effectually securing the payment of the debts of traders."

^p *Ante*, 970.

^q 2 Bac. Abr. 240. 244. 355.

^r Stat. 1 Ann. c. 6. *Ante*, *257.

^s 1 Bing. 171. 190.

levied on a *fieri facias*, &c. may be restored to him. A third person, whose goods are taken under it, may also move the court, to have them restored. But if the right be not clear, the court will leave him to his action against the sheriff; or they will sometimes direct an issue for trying it, and retain the money in court, to abide the event of the trial. On setting aside a judgment and execution for irregularity, the court will restrain the defendant from bringing an action of *trespass*, unless a strong case for damages be shewn.¹

Upon an *erroneous* judgment, if there be a regular writ, the party may justify under it, till the judgment be reversed; for an erroneous judgment is the act of the court.² But if the judgment or execution has been set aside for *irregularity*, the party cannot justify under it; for that is a matter in the privy of himself or his attorney:³ and if the sheriff or officer, in such case, join in the same plea with the party, he forfeits the benefit of his defence.⁴ The sheriff or officer, however, may justify under an *irregular* judgment, as well as an *erroneous* one;⁵ for they are not privy to the irregularity: and so as the writ be not void, it is a good justification, however irregular, and the purchaser will gain a title under the sheriff; for it would be very hard, if it should be at the peril of the purchaser, under a *fieri facias*, whether the proceedings were regular or not.⁷ Accordingly, if the sheriff sell a term under a writ of *fieri facias*, which is afterwards set aside for irregularity, and the produce of the sale directed to be returned to the termor, the latter cannot maintain an *ejectment*, to recover his term against the vendee under the sheriff.⁸ In justifying under a writ of execution, the party need not set forth in his plea, that the writ has been returned: But a justification by the sheriff or officer, under a returnable process, is ill, without shewing a return of it; and if the plaintiff join with the officer, there must be judgment against both.⁹ When

¹ 1 Chit. Rep. 134. and see *id.* 238. *Ante*, 615.

² 1 Str. 509.

³ *Id. ibid.* 15 East, 615. (c.) and see 2 Stark. *Ni. Pri.* 404. 5 Barn. & Ald. 746.

⁴ 5 Barn. & Ald. 746.

⁵ 1 Vez. 195. 1 Maule & Sel. 425.

⁶ 1 Maule & Sel. 425. but see 5 Barn. & Ald. 826. 3 Stark. *Ni. Pri.* 130. S. C.

⁷ 2 Str. 1184. 1 Wils. 17. S. C. The general rule, as laid down by Holt, Ch. J. in the case of *Freeman v. Blewitt*, 1 Salk. 409, 10. is, that where a principal officer is to justify under a returnable process, he must shew that it was returned; for he is commanded to return the writ, and shall not be protected, unless he shew that he paid a full and due obedience in acting under it; but any subordinate officer, as a bailiff, may: And it is there said, that the sheriff cannot jus-

tify under a *fieri facias*, or *capias*, without shewing a return: and see Com. Dig. tit. *Pleader*, 3 M. 24. 6 Durnf. & East, 35. *accord.* But this seems to be erroneous, as to a *fieri facias*, or *capias ad satisfaciendum*. The principal distinction is between *mere* and *final* process. The former ought always to be returned; for otherwise the arrest thereon will be wrongful, and false imprisonment will lie against the sheriff:† 5 Co. 90. 2 Rol. Abr. 563. l. 20. But where *final* process issues out of a superior court, upon which no judgment or other proceeding is to be had, no return is necessary. *Id. ibid.* Cro. Eliz. 237, 8. Moor, 468. 1 Salk. 318. 2 Salk. 700. 2 Ld. Raym. 776; and see Com. Dig. tit. *Return*, F. 1. Chitty on Pleading, 2 V. 587. h. but see 4 Moore, 163. In the case of *Middleton v. Price*, 2 Str. 1184. 1 Wils. 17. S. C. (where a jus-

† To support an action for the rescue of one taken on a *capias ad respondendum*, in an action on the case, it is not necessary that it should appear in evidence that the sheriff had returned the writ and rescue. 3 Har. & M'Hen. Rep. 91.

the plaintiff has execution, and the money is *levied and [*1073] Y paid, and the judgment is afterwards reversed, there the party shall have restitution without a *scire facias*; because it appears on the record that the money is paid, and there is a certainty of what was lost; otherwise where it was levied but not paid, for then there must be a *scire facias*, suggesting the matter of fact, viz. the sum levied, &c. If the judgment be set aside after execution for irregularity, there needs no *scire facias* for restitution;^b but if it be not made, an attachment shall be granted upon the rule for a contempt.^c

An *elegit* is founded on the statute *Westm. 2.* (13 *Edw. I.*) c. 18. by which it is enacted, that "when a debt is recovered or acknowledged in the king's court, or damages awarded, it shall be in the election of him who sues for such debt or damages, to have a writ of *fieri facias* to the sheriff, for levying the debt of the lands and chattels, or that the sheriff deliver to him all the chattels of the debtor, (saving only his oxen, and beasts of his plough,) and a moiety of his land, until the debt be levied, by a reasonable price or extent; and if he be evicted, he shall recover by writ of *novel disseisin*, and afterwards by writ of *re-disseisin*, if there be occasion."^d The writ we are now speaking of lies against the defendant in his life time, or his heir and tenants after his death.* And it may be had against peers of the realm, as well as [*1074] others; and also against executors and administrators, upon a *devastavit* returned.^e But it lies not against an heir, till his full age; and therefore, on a *scire facias* brought against him, the *parol* shall demur, because he may have a good plea to bar the execution, which might be mispleaded.^f If the plaintiff had awarded an *elegit* into one county, and extended the lands upon that writ, it was formerly doubted whether he could, after filing the writ, have sued out an *elegit* into another county.^h But it seems to be now settled, that on a suggestion that the defendant has more land, either in the same or another county, the plaintiff may have a new *elegit* for a moiety of the land, in whatever county it lies.ⁱ And he may award *elegits* into as many different counties as he pleases, without being under the necessity of suing out *testatums*.^k If a writ of *elegit* be sued out in the life time of the defendant, it may be executed after his death:

tification by the sheriff was holden ill, without shewing a return,) the defendants justified under process of an inferior court; and it is a rule, that if an officer of an inferior court do not return process directed to him, false imprisonment lies against him. 2 *Rol. Abr.* 563. l. 10.

^b For the form of a writ of restitution in *ejectment*, after setting aside a judgment and execution for irregularity, in the Exchequer, see *Append. Chap. XLVI.* § 40.

^c 2 *Salk.* 588.

^d For the history of the writ of *elegit*, and the proceedings under it, see 2 *Wms. Saund.* 68. a. (1.) 69. a. (2.) 69. c. (3). And for forms of the writ, see *Append. Chap. XLI.* § 104, &c.

^e *Append. Chap. XLI.* § 111.

^f 1 *Crompt.* 346.

^g *Gilb. Exec.* 58.

^h 1 *Crompt.* 346. 352. *Law of Exec.* 287.

ⁱ 2 *Wms. Saund.* 68. b.

^k 1 *Crompt.* 346. 352. *Law of Exec.* 208.

For there is a distinction between writs original and judicial, in respect of the abatement of the suit, by the death of the defendant: The former generally abate, if the defendant die before judgment,¹ but the latter are not affected by it.² And though the statute giving the *elegit* has not made any express provision concerning the abatement of it by the death of the defendant, it ought to be construed in the same manner as other process of execution, which does not abate by death, when the defendant has no day in court.³

Upon this writ, the sheriff is to empanel a jury; who are to make inquiry of all the goods and chattels of the debtor, and to appraise the same; and also to inquire as to his lands and tenements.⁴ The goods and chattels being appraised, are to be delivered to the plaintiff, at the price set upon them;⁵ and in this respect, an *elegit* differs from a *feri facias*, upon which the sheriff cannot deliver the goods, though he may sell them, to the plaintiff.⁶ If the goods and chattels are sufficient to satisfy the plaintiff's demand, the sheriff ought not to extend the lands,⁷ but otherwise he may extend them: And if, under a writ of *elegit*, the sheriff return *nulla bona*, and extend the land, the extent it seems is good, though in truth the goods were sufficient.⁸ [*1075] And he may not only extend a moiety of the lands properly so called, but also of a reversion,⁹ or rent-charge.¹⁰ But *copyhold* lands are not extendible;¹¹ nor a rent-seck,¹² advowson in gross,¹³ or glebe belonging to a parsonage or vicarage.¹⁴ A term for years may be either extended, or sold as part of the personalty:¹⁵ If it be extended, the plaintiff is accountable for all the profits he receives out of the term, upon such extent; and if he receive the debt out of such term, before it expires, the defendant shall be restored to the term itself;¹⁶ but otherwise he shall keep the term, and not account for the profits of it.¹⁷

At common law, if a man was seized of the legal estate in lands, to the use of, or in trust for another, against whom a judgment had been obtained, or who had entered into a statute or recognizance, these lands were not liable to execution, upon the judgment statute or recognizance of *cestui que trust*.¹⁸ But, by the statute of frauds,

¹ *Ante*, 965.

² O. Bridg. 467.

³ *Id.* 464. 478.

⁴ Co. Lit. 289. b. 2 Inst. 496. Dyer, 100. Cro. Eliz. 584. Com. Dig. tit. *Execution*, C. 14. Bac. Abr. tit. *Execution*, 349.

⁵ Gilb. *Exec.* 33. and see 1 Sid. 184. 1 Lev. 92. 1 Keb. 105. 261. 465. 556. 692. S. C.

⁶ 1 Ld. Raym. 346. Bac. Abr. tit. *Execution*, 349. 352.

⁷ 2 Inst. 395. 1 Crompt. 346.

⁸ O. Bridg. 474.

⁹ Gilb. *Exec.* 38.

¹⁰ *Id.* 39. Moor, 32.

¹¹ 1 Rol. Abr. 888. 3 Blac. Com. 419.

¹² Barn. & Cres. 242, 3.

¹³ Cro. Eliz. 656.

¹⁴ Gilb. *Exec.* 39.

¹⁵ *Id.* 40. 3 Bos. & Pul. 327.

¹⁶ 8 Co. 171.

¹⁷ Gilb. *Exec.* 35.

¹⁸ *Id.* 33.

¹⁹ Co. Lit. 374. b. 2 Wms. Saund. 11. (17.)

† The court of K. B. referred it to the master to take an account of the rents and profits of an estate received by the plaintiff, who was in possession by virtue of an *elegit*, and ordered that the plaintiff should give up possession if it appeared that all the moneys due to him had been received. 3 Barn. & Cres. 733. 5 Dougl. & Ryf. 612. S. C.

29 Car. II. c. 3. § 10. it is enacted, that "it shall be lawful for every sheriff or other officer, to whom any writ or precept is directed, at the suit of any person or persons, of for and upon any judgment, statute or recognizance, to do make and deliver execution, unto the party in that behalf suing, of all such lands, tenements, rectories, tithes, rents and hereditaments, as any other person or persons are in any manner seised or possessed, *in trust* for him against whom execution is so sued, like as the sheriff or other officer might or ought to have done, if the said party, against whom execution is so sued, had been seised of such lands, &c. of such estate as they are seised of in trust for him, *at the time of the said execution sued*; which lands, &c. by force and virtue of such execution, shall accordingly be held and enjoyed, freed and discharged from all incumbrances of such person or persons as shall be so seised or possessed, in trust for the person against whom such execution shall be sued: And if any *cestui que trust* shall die, leaving a trust in fee simple to descend to his heir, then and in every such case, such trust shall be deemed and taken, and is thereby declared to be assets by descent; and the heir shall be liable to, and chargeable with the obligation of his ancestor, for and by reason of such assets, as fully and amply as he might or ought to have been, if the estate in law had descended to him in *possession, in like manner [*1076] as the trust descended." The words in the act "*at the time of the said execution sued*," are held to refer to the seisin of the trustee; and therefore if he has conveyed the lands, by the direction of *cestui que trust*, before execution, though seised in trust at the time of the judgment, the lands cannot be taken in execution.¹ And a trust created by a defendant in favour of himself and another person, is not a trust within the meaning of the above statute; which is confined to cases where the trustees are seised or possessed in trust for a defendant alone, and not jointly with another person.² An equity of redemption cannot be taken in execution on the above statute,³ though it is deemed assets;⁴ and therefore, when the estate is mortgaged, the plaintiff's remedy is by filing a bill in equity to redeem, which he is entitled to do, on payment of principal, interest and costs:⁵ But an *elegit* must be first sued out against the defendant, and delivered to the sheriff;⁶ though it does not seem to be necessary to have it returned.⁷ And it is holden, that if a man be *cestui que trust* of a term, it is not assets within the statute, which extends only to a trust of lands in fee.⁸ An equity of redemption, however, may it seems be taken under an *extent*.⁹

No notice is given of executing an *elegit*.¹⁰ And if there be no

¹ Com. Rep. 226. Com. Dig. tit. *Execution*, (C. 14.)

² 4 Barn. & Ald. 684.

³ 3 Atk. 200. 739. 1 Ves. jun. 431. 3 Bro. Chan. Cas. 478. S. C. 8 East, 467. 2 New Rep. C. P. 461. *Ante*, 1042.

⁴ 2 Freem. 115. 2 Atk. 290. and see Toll. Exec. 1 Ed. 415, 16.

⁵ Powell Mortg. 1 Ed. 99. and see Forrest, 162. 1 Madd. Chan. 522, 3.

⁶ 3 Atk. 200. and see 1 Vern. 399. 1 P. Wms. 445. 6 Ves. 72. 1 Madd. Chan. 205. 522, 3.

⁷ Redesd. Pl. 3 Ed. p. 102. 1 Madd. Chan. 205. (r.) *Ante*, 1042.

⁸ 2 Vern. 248. and see 2 Saund. 11. (17.) 8 East, 474. 486.

⁹ Forrest, 162, 3. 1 Price, 207.

¹⁰ 1 Crompt. 363.

lands, the sheriff need not return an *inquisition*;^a but otherwise an *inquisition* must be taken and returned, describing the lands with convenient certainty;^x and after it is taken, the sheriff must deliver a moiety to the plaintiff, by metes and bounds.^a If he do not, the return is ill, and may be quashed for uncertainty;⁴ or the objection may be taken at *nisi prius*, on the trial of an ejectment brought upon the *elegit*.^a and if the defendant be joint-tenant, or tenant in common, it ought to be specially alleged in the return.^x But it has been adjudged, that upon an *elegit*, the sheriff is not bound to deliver a moiety of each particular tenement and farm, but only [*1077] certain tenements, &c. making in value a moiety of the whole.⁷ If he deliver more than a moiety, the execution is void.^x

It was formerly usual for the sheriff to deliver *actual* possession of a moiety of the lands; but he now only delivers *legal* possession: and if the plaintiff do not enter, which it seems he may do by virtue of the *elegit*,^a he must, in order to obtain actual possession, proceed by *ejectment*,^b in which an examined copy of the judgment roll, containing the award of the *elegit* and return of the *inquisition*, is evidence of the lessor of the plaintiff's title, without proving a copy of the *elegit*, and of the *inquisition*.^c

After an *elegit*, if lands be duly extended, and delivered to the plaintiff, he cannot have any other species of execution, unless in case of eviction; when he may proceed, in the method pointed out by the statute of *Westm. 2.* or if he be evicted out of all the lands, he may sue out a *scire facias* upon the statute 32 Hen. VIII. c. 5. to have a new writ of execution, for what remains unsatisfied: But if he be evicted out of part only, or of the whole but for a time, as by a prior judgment, so that the extent is still continuing, there is no remedy by this statute.⁴ If the defendant has no lands, and the goods are not sufficient to satisfy the plaintiff, he may have a *capias ad satisfaciendum* after an *elegit*.^c And a void *elegit* or *inquisition*, being as none, will not prevent the plaintiff from having a new *elegit*.^f

A question having arisen, in the court of Chancery, whether, upon an *elegit*, the plaintiff could be allowed *interest*, beyond the penalty of a judgment, Lord *Hardwicke* was of opinion, that at law, upon a judgment entered up, the penalty is the *debitum recuperatum*, and the stated damages between the parties; but if the creditors do not take out an execution against the person of the debtor or his personal estate, but extend the lands by *elegit*, which the sheriff does only at the annual value, and much below the real, the creditor holds

^a 2 Str. 874.

^x Moor, 8. Com. Dig. tit. *Execution*, (C. 14.) Append. Chap. XLI. § 107.

^a Dalt. Sher. 135.

⁴ Carth. 453.

^x 1 Barn. & Ald. 40.

^x Hut. 16.

^x Doug. 473.

^x 2 Salk. 563, 4. 1 Ld. Raym. 718. 1 Vent. 259. S. C. Run. Eject. 2 Ed. 384. and see 1 Barn. & Ald. 40. 2 Barn. & Cres.

242, 3.

^a 6 Taunt. 202. 1 Marsh. 542. S. C.

^b 2 Eq. Cas. Abr. 381. 3 Durnf. & East, 295.

^c 2 Maule & Sel. 565. but see Gilb. *Evid.* (by *Lofft*), 10, 11. Run. *Eject.* 2 Ed. 384. 2 Wms. Saund. 69. c. *contra*.

⁴ Co. Lit. 289. b. Gilb. *Exec.* 57, 8.

^x 1 Str. 226. 2 Ld. Raym. 1451. S. P. *ante*, 2032, 3.

^x Gilb. *Exec.* 64.

quousque debitum satisfactum fuerit, and at law the debtor cannot, upon a writ *ad computandum*, insist upon the creditor's doing more than account for the extended value; but if the debtor come into a court of equity for relief, this court will give it him, by obliging the creditor to account for the whole that he has received; and as a person who comes for equity must do equity, will direct the debtor to *pay interest to the creditor, even though it should exceed [*1078] the principal: And he said, he remembered very well, upon Serjeant *Whitaker's* insisting, before Lord Chancellor *Cowper*, that this would be repealing the statute of *Westminster*, his Lordship said, he would not repeal the statute, but he would do complete justice, by letting the creditor carry on the interest upon his debt, as he was to account for the whole he had received.†

It has been already seen,^b that the execution for the defendant, upon a judgment in *replevin*, is at common law for a return of the cattle or goods, or upon the statute 17 *Car. II. c. 7.* for the arrearages of rent and costs. The writ of *retorno habendo*, in the former case, shortly recites the proceedings and judgment in *replevin*, and commands the sheriff, to cause the cattle or goods to be returned to the defendant, to hold him irreplevisable for ever, after judgment on *verdict*,¹ or *demurrer*,² or, upon a *non pros* for want of a declaration,¹ or plea in bar,^m or *nonsuit* at the trial, that he do not deliver them, on the complaint of the plaintiff, without the king's writ, (of *second deliverance*,ⁿ) which shall make express mention of the judgment. The latter part of the writ is founded on the statute of *Westminster II. (13 Edw. I.) c. 2.* previous to which the return was never irreplevisable after a *nonsuit*, whether before the avowry or after, or before or after issue joined; because, where the defendant had judgment for a return on a nonsuit, though after verdict, that judgment was not founded upon the verdict, but on the default of the plaintiff, in withdrawing himself at a continuance day after the verdict.^o When judgment is given on *demurrer*; for a return of the goods, the avowant may immediately have a writ of *retorno habendo*, and inquiry of damages;^p and after *verdict*, or *inquiry* executed, he may have a *retorno habendo*, and *fieri facias* for the damages and costs, in the same writ.^q

If the cattle or goods be *eloigned*, or removed by the plaintiff, so that the sheriff cannot deliver them on the writ of *retorno habendo*, the defendant, on the sheriff's return of *elongata*,[†] may either have

1 3 *Atk.* 517, 18. and see *Amb.* 520, 21.
1 *East*, 403, 436.

^a *Ante*, 1030.

¹ *Append. Chap. XLV. § 79.*

² *Id.* § 78.

¹ *Id.* § 76.

^m *Id.* § 77.

ⁿ *Id.* § 88, 9.

^o *Gilb. Repl.* 4 *Ed.* 211.

^p *Append. Chap. XLV. § 8.*

^q *Id.* § 79.

[†] *Id.* § 82.

† The condition of a replevin bond for prosecuting the plaint "with effect," means prosecuting it "with success," and, therefore, if a plaintiff in replevin fails, the bond is broken, and the defendant is not restrained from suing on the bond, though he omits to sue out a writ of *retorno habendo* and cause *elongata* to be returned thereon: 8 *Dowl. & Ry.* 72.

a *capias in withernam*,^{*} for taking other cattle and goods in lieu of [*1079] them, or he may sue out a *scire facias*[†] against the pledges, for a return at common law; or if the distress was for rent, and the sheriff has taken a replevin bond, under the statute 11 Geo. II. c. 19. § 23. the defendant may take an assignment of it, and bring an action thereon against the pledges, if sufficient;† or if the sheriff has omitted to take a replevin bond, or the pledges were insufficient at the time of taking it, he may proceed by *scire facias*, or action on the case against the sheriff, for neglect of duty.[‡] But if the defendant proceed upon the statute 17 Car. II. c. 7. for the arrearages of rent and costs, he cannot have a writ of *retorno habendo*; nor consequently proceed against the pledges, on account of the plaintiff's not making a return of the cattle or goods, nor, as it seems, against the sheriff, for taking insufficient pledges: If judgment, however, be given against the plaintiff, for not prosecuting his suit with effect, his pledges will be answerable to the defendant, notwithstanding he has afterwards proceeded on the statute, and obtained judgment, on a writ of inquiry, for the arrearages of rent and costs.[‡]

In *ejectment* the execution is a writ of *habere facias possessionem*, or (as it is commonly called,) a writ of *possession*. This writ may be issued, without a *scire facias*, at any time within a year and a day after judgment signed, whether it be against the casual ejector by default, or after verdict against the tenant. But when the plaintiff is nonsuited at the trial, for want of the defendant's confessing lease entry and ouster, he is not entitled, in the King's Bench, to sign judgment against the casual ejector, nor consequently to issue execution, till the day in bank, or first day of the ensuing term;[‡] though it seems to be otherwise in the Common Pleas, where the plaintiff in such case has been allowed to sign judgment, and take out execution, immediately after the trial:[‡] And, in the King's Bench, judgment may be regularly signed on the first day of the ensuing term, and a writ of possession issued on the same day, although the *postea* be not delivered over at the time, by the associate to the

* Append. Chap. XLV. § 83, 4.

† *Id.* § 85, 6.

‡ Gilb. Repl. 4 Ed. 216, &c.

§ 4 Moore, 606. 2 Brod. & Bing. 107. 780. (a.)

‡ 2 Durnf. & East, 779.

‡ *Thasgmorton ex dem. Fairfax v. Bentley*, H. 27 Geo. III. C.P. 2 Durnf. & East, 780. (a.)

S. C.

† A rent charge is within the meaning of the 23d sec. of the 11 Geo. II. c. 19.; upon a replevin, therefore, of a distress for such a rent, the sheriff may take, and assign a bond as in a replevin for any other kind of rent. 2 Bingham. 349. The cases which have decided (under the 22d sec. of the same statute) that a party who replevies goods distrained for a rent charge does not subject himself to double costs, (*Vide ante*, p. 1013,) do not apply to the 23d section. The former is penal, the latter remedial. *Id. ibid.*

‡ In an action against the sheriff for taking insufficient sureties in replevin, the assignee of the replevin bond cannot recover as special damage (beyond the penalty of the replevin bond) the expenses of a fruitless action against the pledges, unless he gives the sheriff notice of his intention to sue them. 3 Bingham. 56. C. B.

attorney for the plaintiff.^a When the landlord is admitted to defend instead of the tenant, and judgment is thereupon signed against the casual ejector, with a stay of execution till further order, and the plaintiff is afterwards nonsuited at the trial, on account of the landlord's not confessing lease entry and ouster, the lessor of the "plaintiff, we have seen," must apply to the court, for leave [*1080] to take out execution against the casual ejector.^c In such case, if a writ of error be brought by the landlord, it may be shewn for cause, and will be a sufficient reason against taking out execution;^d but if the landlord omit the opportunity of shewing it for cause, the execution is regular, and cannot be set aside.^e And if the plaintiff, after obtaining a verdict in *ejectment*, sue out a writ of *habere facias possessionem*, without waiting to tax his costs, the defendant's writ of error, we have seen,^f will not operate as a *supersedeas*.^g In *ejectment* against a feme sole, who married before trial, and verdict and judgment against her by her original name, the court held, that it was regular to issue a *habere facias possessionem* and *feri facias* against her by the same name, though the *feri facias* was inoperative.^h After a year and a day, if the lessor of the plaintiff have previously neglected to sue out his writ of possession, he must revive the judgment by *scire facias*, as in other cases;ⁱ and the *scire facias*, after judgment by default against the casual ejector, should go against the *tertenant*, as well as the defendant.^k

The writ of *habere facias possessionem* is directed to the sheriff of the county where the action was laid; and after reciting the judgment, commands him, without delay, to cause the plaintiff to have possession of his term, (or, if there be more than one demise, "his several term,") yet to come of and in the tenements recovered.^l And after verdict and judgment against the tenant, a *feri facias* or *capias ad satisfaciendum* for the damages and costs, may be included in the same writ.^m This writ, for which there is a *præcipe* in the King's Bench, but not in the Common Pleas,ⁿ is engrossed on a half-crown stamp;^o and is made returnable on a *general* return day or day *certain*, according to the nature of the proceedings; if by *original*, on the former, and if by *bill* on the latter: and after being signed and sealed, it is delivered to the sheriff, who makes out a warrant thereon, directed to his officer. It is usual for the lessor of the plaintiff to give the sheriff an indemnity for executing it.^p

Under this writ, the sheriff or his officer, by the direction of the lessor of the plaintiff or his attorney, delivers possession of the premises recovered; and as the words of the writ are, "that he cause

^a 1 Barn. & Crea. 118. 2 Dowl. & Ryl. 229. S. C. *Ante*, 962.

^b *Ante*, 1034.

^c 2 Str. 1241. 2 Bur. 756, 7. Barnes, 182. 185. Append. Chap. XLVL § 25, 6.

^d 2 Str. 1241. Barnes, 208.

^e 2 Bur. 756, 7.

^f *Ante*, 1031.

^g 4 Taunt. 289. and see Barnes, 212, 13. 8 Taunt. 538, 2 Moore, 581. S. C.

^h 1 Maule & Sel. 557. *Ante*, 1050.

ⁱ 1 Salk. 258. 2 Ld. Raym. 806. S. C. and see 2 Barn. & Ald. 773. 1 Chit. Rep. 535. S. C. *Post*, Chap. XLIII.

^j 1 Salk. 258.

^k Append. Chap. XLVI. § 27, &c.

^l *Id.* § 33, &c.

^m 2 Sel. Pr. 177.

ⁿ Stat. 35 Geo. III. c. 184. *Sched. Part II.* § 3.

^o *Ruin. Ej.* 2 Ed. 487.

him to have possession, &c." there must be a full and actual possession given by the sheriff; and consequently, all power necessary [*1081] for this end must be given him: therefore, if the recovery be of a house, the sheriff may justify breaking open a door, if he be denied entrance by the tenant, because the writ cannot be otherwise executed.^q If the plaintiff recover *several* messuages, or lands in the occupation of *different* persons, the sheriff must go to each house, or the land occupied by each tenant, and deliver the possession thereof, by turning out the tenants; for the delivery of one messuage or parcel of land, in the name of all, is not in that case a good execution of the writ; because the possession of one tenant is not the possession of the other, each having a *several* possession.^r But it seems that if all the messuages or lands were in the occupation of *one* tenant, it is sufficient to give possession of *one* messuage or parcel of land, in the name of all:^s and this indeed seems to be the safest way for the sheriff, because he executes the writ at his peril; and therefore if he give possession of any messuage or land not recovered, and not included in the *habere facias possessionem*, he is a trespasser.^t But the surest and best way is said to be, for the sheriff to remove all the tenants entirely out of each house or parcel of land, and when the possession is quitted, to deliver it to the plaintiff: for if the sheriff turn out all the persons he can find in the house, and give the plaintiff, as he thinks, quiet possession, and after the sheriff is gone, there appear to be some persons lurking in the house, this is no good execution, and the plaintiff may have a new writ of *habere facias*.^u If the execution be for 20 acres, it seems the sheriff must give 20 acres in quantity, according to the common estimation of the county where the land lies:^v And on a recovery of land, being part of a highway, the sheriff should deliver possession, subject to the right of passage over it, for the king and his people.^w

But it is at the lessor of the plaintiff's peril to take more, under the writ of possession, than he is strictly entitled to;^x and if he take more, the court on motion will order it to be restored.^y Thus, where the plaintiff in *ejectment*, as tenant in common, recovered possession of *five* eighths of a cottage with the appurtenances, and a writ of possession was executed by the sheriff, who turned the tenant out of possession of the whole, and locked up the door, the court of Common Pleas made a rule upon the sheriff and lessor of the plaintiff, to restore the tenant to the possession of *three* eighths [*1082] parts of the *premises; otherwise he would be obliged to bring another *ejectment* for the same.^b

If the officer be disturbed in the execution of the writ, the court, on an affidavit, will grant an *attachment* against the party, whether he be the defendant or a stranger; because the writ is the process

^q 5 Co. 91. b. Run. Ej. 2 Ed. 485.

^r 1 Rol. Abr. 886. Run. Ej. 2 Ed. 485, 6.

^s *Id. ibid.* 1 Rol. Rep. 421.

^t Run. Ej. 2 Ed. 486.

^u 1 Leon. 154. Run. Ej. 2 Ed. 486.

^v 1 Rol. Abr. 886. 1 Rol. Rep. 420.

Run. Ej. 2 Ed. 487.

^w 1 Bur. 133.

^x *Id.* 627. 629. 5 Bur. 2673.

^y *Id. ibid.* Run. Ej. 2 Ed. 485. 487.

^b 3 Wils. 49. and see Barnes, 191.

of the court, and any disturbance given to the execution of it, is a contempt of the authority of the court from whence it issues, and as such will be punished by the court:^c And the process is not understood to be executed, nor the execution complete, until the sheriff and officer are gone, and the plaintiff left in quiet possession.^d But after possession given, either on the *habere facias* or by agreement of the parties,^e the law seems to make a difference, where the plaintiff is turned out of possession by the *defendant*, and where by a *stranger*. When it is done by the *defendant*, immediately or soon after the possession is delivered, the plaintiff it seems may have a new *habere facias*, before the former writ is returned;^f because the defendant himself shall never by his own act keep the possession, which the plaintiff hath recovered from him by due course of law:^g And if the sheriff give possession of part only, he may have a new *habere facias* for the rest.^h But if the writ be returned by the sheriff, though not filed, it seems no new *habere facias* can issue; because when the return is made, it becomes a record which the court is entitled to:ⁱ And where the landlord, after the possession had been delivered above a month, went down into the country, and prevailed with the tenants, on giving them security, to attorn to him, and then the plaintiff in ejectment came and complained to the court, and moved for a new writ of possession, the court refused to relieve him, there having been a regular execution of the first writ; and said, the distinction was, that if immediately after the writ had been executed, the tenants had attorned, there should have been a new writ, but not where the possession had continued as delivered so long as it had in this case.^k So, where the lessor of the plaintiff had been put into possession, by virtue of a writ of *habere facias possessionem*, on the 22nd of February 1806, which writ had never been returned by the sheriff, and on the 10th of October 1807, while he continued in possession, the person against whom he had recovered, *entered into the house [*1083] by force, and resisted with violence all attempts to regain the possession, upon which a new *habere facias* was moved for, and an attachment against the party in possession; the court denied the authority of the case in *Keble*,^l and held, that possession having been given under the first writ, the sheriff ought to have returned that he had given possession, and that the plaintiff could not afterwards have had another writ: An *alias*, they said, cannot issue after a writ is executed; if it could, the plaintiff, by omitting to call on the sheriff to make his return to the writ, might retain the right of suing out a new *habere facias possessionem*, as a remedy for any trespass the tenant might commit within twenty years after the judgment: and upon these grounds, the rule was refused.^m

^c 6 Mod. 27. 1 Salk. 321. S. C. and see 2 Brownl. 253. 1 Keb. 779. 2 Keb. 245. 2 Blac. Rep. 892.

^d Run. Ej. 2 Ed. 489. *Ante*, 1057.

^e 1 Keb. 779. 785.

^f 2 Brownl. 216. 253. 1 Rol. Rep. 363. Palm. 289. 1 Keb. 779. 785, 6. 6 Mod. 27. 1 Salk. 321. S. C.

^g Run. Ej. 2 Ed. 489.

^h 2 Keb. 245.

ⁱ 2 Brownl. 216. 253. and see 1 Keb.

785.

^k 2 Str. 830.

^l 1 Keb. 779.

^m 1 Taunt. 55.

When a *stranger* turns the plaintiff out of possession, after execution fully executed, the plaintiff is put to a new action, or an indictment for a forcible entry, where the force will be punished:^a The reason is, that the title was never tried between the plaintiff and the stranger, who may claim the land by a title paramount to that of the plaintiff, or he may come in under him; and then the recovery and execution in the former action, ought not to hinder the stranger from keeping that possession which he may have a right to: If the law were otherwise, the plaintiff might, by virtue of a new *habere facias*, turn out even his own tenants, who come in after the execution; whereas the possession was given him only against the defendant in the action, and not against others who were not parties to the suit.^o

For executing a writ of *feri facias*, or *capias ad satisfaciendum*, the sheriff is entitled, by the statute 29 *Eliz.* c. 4. to *twelve pence* for every 20s. when the sum exceedeth not a hundred pounds, and *six pence* for every 20s. above that sum, that he shall levy or take the body in execution for; which is called his *poundage*.^p But, by the statute 3 *Geo.* I. c. 15. § 17. poundage upon a *capias ad satisfaciendum* shall not be demanded or taken for any greater sum than the real debt *bona fide* due, and marked on the back of the writ: And by the same statute,^q the sheriff is entitled, upon executing a writ of *habere facias possessionem aut seisinam*, to have for poundage, *twelve pence* for every 20s. of the yearly value of the lands [*1084] whereof *possession is given, where the whole exceedeth not the yearly value of a hundred pounds, and *six pence* only for every 20s. *per ann.* above that value. The writ of *elegit*, though mentioned in the preamble of this statute, is omitted in the body of the enacting clause: and hence it seems, that the sheriff is entitled, on executing an *elegit*, to poundage on the whole amount of the debt.^r

If the sheriff levy under a *feri facias*, he is entitled to poundage, though the parties compromise, before he sells any of the defendant's goods;^s or though the execution be afterwards set aside for irregularity:^t and accordingly, where the sheriff levied under a *feri facias*, and received the money, and afterwards the judgment and execution being set aside for irregularity, and the money ordered to be returned, paid it back, with the assent of the plaintiff, the court of King's Bench held, that the statute 43 *Geo.* III. c. 46. did not take away his remedy, by action of *debt* against the plaintiff, for his poundage.^u So, the sheriff is entitled to poundage, upon a *capias ad satisfaciendum*, though the defendant go to prison, without satisfying the plaintiff:^v And if the sheriff, having taken

^a Sty. Rep. 318. and see *id.* 408. 1 Keb. 779. 785.

^o Run. Ej. 2 Ed. 489.

^p *Ante*, 1036.

^q § 16.

^r 1 Maule & Sel. 105.

^s 5 Durnf. & East, 470.

^t 6 Esp. Rep. 111.

^u 4 Maule & Sel. 256.

^v 4 Bur. 1981. Imp. *Sher.* 145.

the defendant on one writ, detain him on another, he is entitled to poundage on both.⁷ But it seems that he is not entitled to poundage, if the money be paid to him, without any levy;⁸ nor on executing a writ of attachment, for non-payment of money;⁹ nor upon a *capias utlagatum* on *mesne* process, under which there has been a seizure and inquisition, but no writ of *venditioni exponas*;¹⁰ nor where money is paid into court by the sheriff, under the statute 33 Geo. III. c. 46. § 2;¹¹ nor on levying for a crown debt, under a *levari facias*.¹² And the sheriff cannot maintain an action for the expense incurred in seizing and keeping possession of goods under a *fieri facias*, at the request of the party suing out the writ, although they are not sold, on account of his refusing to give an indemnity against the claims of third persons.¹³

For the poundage he is entitled to, the sheriff may maintain an action of *debt* on the statute;¹⁴ or he may retain it out of the sum levied: And, under the statute 3 Geo. I. c. 15. the sheriff may retain his poundage out of the sum levied, and need not wait for the allowance of it out of his accounts;¹⁵ or, if he have paid [*1085] over the money levied to the prosecutor of the extent, without having deducted poundage, he may obtain it by motion to the court of Exchequer.¹⁶ If the sheriff take more than he is entitled to for poundage, &c. he is liable to an action for treble damages, at the suit of the party grieved,¹⁷ and shall forfeit 40*l.* to the king and the informer;¹⁸ or an action for money had and received may be maintained against him by the plaintiff, to recover the surplus.¹⁹ But as a sheriff, who levies under a *levari facias* for a crown debt, is not entitled to poundage under the statute 29 *Eliz.* c. 4. an action against him on that statute, for extortion in such a case, is misconceived.²⁰

When the judgment is *satisfied*, by any of the above writs of execution or otherwise,²¹ the defendant has a right to call on the plaintiff for a *warrant*,²² or authority, directed to some attorney of the court wherein the judgment is recovered, authorizing such attorney to enter up satisfaction on the judgment roll; which being obtained, a *satisfaction piece*,²³ is made out in the King's Bench, on a slip of unstamped parchment, in the form of a bail-piece, and taken, with the warrant of attorney, to the clerk of the judgments, who will make an entry thereof in his book of remembrances, and deliver it over to the clerk of the treasury, who enters the same on

⁷ *Taylor v. Ward*, E. 24 Geo. III. K.B.

⁸ 2 Maule & Sel. 294.

⁹ 2 East, 411.

¹⁰ 2 Maule & Sel. 294.

¹¹ 2 Barn. & Ald. 770. 1 Chit. Rep. 529. S. C. 6 Moore, 124.

¹² 3 Brod. & Bing. 143. 6 Moore, 338.

S. C.

¹³ 3 Campb. 374.

¹⁴ 1 Salk. 209. 333. 2 Ld. Raym. 1212.

S. C.

¹⁵ Parker, 180.

¹⁶ *Id. ibid.*

¹⁷ 2 Durnf. & East, 148.

¹⁸ 29 *Eliz.* c. 4. and see stat. 3 Geo. I. c. 15. § 13. *Ante*, 1024.

¹⁹ 1 Stark. *Ni. Pri.* 345.

²⁰ 3 Brod. & Bing. 143. 6 Moore, 338.

S. C.

²¹ But see 3 Brod. & Bing. 3. 6 Moore, 65. S. C.

²² Append. Chap. XLI. § 112.

²³ *Id.* § 113.

the roll:^a And the defendant has been allowed to enter satisfaction on the roll, upon a judgment obtained against him in the King's Bench, on his acknowledging satisfaction for the amount, upon a judgment obtained by him in the Common Pleas, against the plaintiff, for a larger amount, although he had the plaintiff in custody in execution on that judgment.^b So, after a plaintiff had recovered damages under a writ of inquiry in *trover*, for the conversion of his title deeds, the court permitted satisfaction of the damages to be entered on the roll, upon the terms of the defendant delivering up the deeds, and paying all the plaintiff's costs, as between attorney and client, and submitting to other terms, by which plaintiff was placed in as good a situation as he was in, before the cause of action.^c In the Common Pleas, the clerk of the treasury brings the judgment [*1086] roll into court, in *term* time, and the secondary *enters satisfaction thereon: In *vacation*, a judge's *fiat* is obtained for that purpose, by the clerk of the judgments, who enters satisfaction on the roll:^d And, on entering satisfaction on the roll, it is usual, we have seen,^e for the plaintiff to pay one shilling for every hundred pounds recovered, to the secondary, who pays it over to the *junior* judge's clerk, by whom it is distributed among the prisoners in the Fleet prison.

^a Append. Chap. XLI. § 114, 15. And see stat. 3 Geo. IV. c. 39. § 8. for entering satisfaction on a warrant of attorney, or *cognovit actionem*. *Ante*, 603. 608.

^b 1 Maule & Sel. 696.

^c 1 Dowl. & Ry. 201.

^d Imp. C. P. 621.

^e *Ante*, 514.

CHAP. XLII.

OF EXECUTION BY LEVARI FACIAS, AND EXTENT; AND
THE PROCEEDINGS THEREON.

HAVING considered in the last chapter, the ordinary modes of execution, for debt or damages and costs, by *feri facias*, *capias ad satisfaciendum*, and *elegit*; and by *retorno habendo* and *habere facias possessionem*, in *replevin* and *ejectment*; I shall, in the present chapter, take a practical view of the writs of *levari facias* and *extent*, which are of less frequent occurrence, with the proceedings thereon.

The *levari facias*, of which something was said in the last chapter,^a is a process, by which the sheriff is commanded to levy a sum of money, of the lands and chattels of the defendant;^b and it is either for the *king* or the *subject*. There are several sorts of execution for the king: 1. a *capias ad satisfaciendum*, which takes the body of the debtor; 2. a *feri facias*, to take his goods; 3. a writ, which is called the *long writ*,^c comprising a *capias ad satisfaciendum*, *feri facias*, and *extendi facias*; 4. a *levari facias*, where the land is the debtor.^d This latter process may be issued at common law, for levying a fine or debt to the king: And where a defendant convicted of a misdemeanor, was sentenced to be imprisoned for two years, and to pay a certain fine, and to be further imprisoned till the fine was paid, the court of King's Bench in a late case held, that a *levari facias* might be issued out of that court for the fine, before the expiration of the two years;^e and that the sheriff was bound *ex officio* to levy it: at all events, that the writ of *levari facias* was regular, having been adopted by the crown.^f This writ may also be sued out of the court of Exchequer, for levying penalties,^g arrears of taxes,^h *or the issues and profits of lands returned [*1088] by the sheriff, on a special *capias utlagatum*;ⁱ in which latter case it has been holden, that the cattle of a stranger, *levant and couchant* upon the land, may be taken and sold under it.^k So, if lands be

^a *Ante*, 1030, 31.

^b Plowd. 441. (a.) and see Bac. Abr. tit. *Execution*, C. 4. Com. Dig. tit. *Execution*, C. 3. tit. *Process*, E. 4.

^c Gilb. Excheq. 117, *h.c.* 1 Chit. Rep. 434.

^d 1 Ld. Raym. 307. and see 3 Co. 12. b. Gilb. Excheq. 125, 6. 166, 7. 171. Skin. 619. 3 Salk. 286.

^e 2 Barn. & Ald. 609. 1 Chit. Rep. 428.

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S. C. and see 2 Show. 166. Skin. 12. T. Jon. 185. S. C.

^f 1 Chit. Rep. 583.

^g Gilb. Excheq. 125, 6. and see 2 Barn. & Ald. 609. 1 Chit. Rep. 428. S. C.

^h Append. Chap. XLII. § 1.

ⁱ Gilb. Excheq. 126. *Ante*, *157.

^k 1 Ld. Raym. 305. 1 Salk. 395. 408. S. C.

seized on an extent, process of *levari facias* may be issued to levy the rents half yearly, or oftener if required, until the principal debt, with costs and damages, as the court shall think fit, be satisfied.¹ The court of King's Bench will not give a sheriff directions how he shall dispose of property remaining in his hands, which has been taken in execution, towards payment of a fine imposed upon the defendant on a conviction for a misdemeanor; but if the sheriff has made an improper return, it may be quashed.² And the court of Common Pleas cannot apply the forfeited penalties of recognizances of bail, to attachments for resisting an execution, to the discharge of the debt and costs of the plaintiff in the original action.³

The *levari facias* for the *subject* is either on a recognizance, or statute merchant, &c. By the common law, a *levari facias* may be sued out within a year, upon a recognizance, against the cognizor, for the money mentioned therein, to be levied of his lands and chattels.⁴ And this seems to be the proper process, after judgment in *scire facias*, on a recognizance of bail, upon which a *capias ad satisfaciendum* does not lie, in the Common Pleas.⁵ So, upon a statute merchant, after the recognizance is certified into Chancery, if the cognizor be an ecclesiastical person, a *levari facias* shall be awarded, to levy the debt of his moveable goods; for his body shall not be taken:⁶ which writ may be directed to the sheriff, if the clerk has a lay fee; otherwise it shall be to the bishop of the diocese where his benefice lies;⁷ or, if he has benefices in several dioceses, there may be a writ for part to one bishop, and another for the residue to the other bishop:⁸ and if part of the debt be levied by *levari facias*, an *alias levari facias* may issue for the residue.⁹ So, if the sheriff return *nulla bona* to a *fieri facias*, and that the defendant is a beneficed clerk, having no lay fee, a *levari facias*, we have seen,¹⁰ may be sued out *de bonis ecclesiasticis*, under which the tithes or [*1089] other profits of the living may be taken in execution. It should be further observed, that the execution against the goods and chattels of the defendant is sometimes, in point of form, a *levari facias*, and particularly in the court of Exchequer;¹¹ but this writ has no other effect than a *fieri facias*. There is also a *levari facias*, for executing the judgment of a county court; but this latter writ ought to be *de bonis et catallis* only, and not *de terris et catallis*;¹² and the goods cannot be sold under it, without a special custom.¹³

The writ of extent, or *extendi facias*, is a writ of execution against the body lands and goods, or the lands and goods, or the

¹ Gilb. Excheq. 170.

² 1 Dowl. & Ry. 474.

³ 3 Taunt. 112.

⁴ Reg. 298. b. F. N. B. 265. D. and see Com. Dig. tit. *Statute Staple*, D. 3. 1 Chit. Rep. 434. *Ante*, 1030, 31.

⁵ *Post*, Chap. XLIII.

⁶ Reg. 298. b. 300. F. N. B. 131. D. 265. D. 266. A. Append. Chap. XLII. §

25.

⁷ F. N. B. 266. A. D.

⁸ *Id.* 266. A.

⁹ Reg. 299. b. F. N. B. 265. H. and see Com. Dig. tit. *Statute Staple*, D. 3.

¹⁰ *Ante*, 1063.

¹¹ Append. Chap. XLI. § 2. (a.)

¹² 2 Lutw. 1413.

¹³ *Id. ibid.*

lands only, of the debtor: and it is either for the *king*, or the *subject*; for the former, it is an ancient prerogative writ, for obtaining satisfaction of debts originally due or assigned to the king, or found on an inquisition taken on a writ of extent, or *diem clausit extremum*. Debts originally due to the king are of *record*, or not of record: Debts of record are founded on judgments or recognizances, or inquisitions taken and returned on commissions issuing out of the court of Exchequer: Debts not of record are on bonds, or simple contracts; which latter are either due from the known public officers and accountants to the king, or from third persons. If a man receive the king's money, knowing it to be so, an extent may issue against him as debtor to the king;^a otherwise if he do not know it to be the king's money:^b And if it be found by inquisition against a receiver general, that he has paid over money to A., an immediate extent may issue against A.; for this is the king's money.^c

The body lands and goods of the king's debtor, or his lands and goods after his death, were liable at common law to the king's execution;^d but by *magna charta*, (9 Hen. III.) c. 8. the king and his bailiffs were restrained from seizing any land or rent, for any debt, as long as the present chattels were sufficient to pay the debt, and the debtor was ready to satisfy the same:^e and accordingly, a *conditional* writ was framed, commanding the sheriff to inquire of the goods and chattels of the debtor, and take them into the king's hands and if *they were not sufficient to pay the debt, then [*1090] to inquire of and extend the lands, &c. and to take the body of the debtor.^f This writ, (according to the opinion of lord Coke,^g) was made *after* the statute 33 Hen. VIII. c. 39. § 50. 55. but that opinion was doubted by lord chief baron *Gilbert*, in his treatise on the court of Exchequer;^h because the writ seems to have been so contrived, that an inquisition should be found, whether the debtor had any goods or chattels, and if upon the inquisition none were found, then to extend the land, and take the body of the debtor: So that it seems, this writ might have been used *before* the statute of Hen. VIII. without any violation of *magna charta*; for if it were found that the debtor had no goods, they might seize the land, and take the body; and therefore it seems to be a writ that was used upon motion to the court, and in cases of necessity, *before* the statute of Hen. VIII.: But *since* that statute, the practice has been to issue the writ of extent, in its present form, to levy the king's debt of the body lands and goods of the debtor *absolutely*, without any previous inquisition touching the goods:ⁱ And under this writ, the sheriff may in strictness seize the lands, although the goods should

^a 11 Co. 92. a. Cro. Eliz. 545. 4 Leon. 32.

^b *Id. ibid.* Lane, 23. and see West on *Extents*, 32, 3. 265, 6.

^c Bunb. 128. and see *id.* 24. 134. Com. Dig. tit. *Dett*, G. 7. 2 Price, 13. West, 267. 8. C. 7 Price, 633.

^d 3 Co. 12. b. and see Cro. Jac. 450. 3

Salk. 586. 2 Saund. 70. (a.) Com. Dig. tit. *Dett*, G. 2.

^e Gilb. Excheq. 124. 3 Salk. 286.

^f 2 Inst. 19. Gilb. Excheq. 126, 7.

^g 2 Inst. 19. and see West, 76, &c. § 190.

^h Gilb. Excheq. 127, 8.

ⁱ *Id. ibid.* and see West, 2, &c. Manning's Law of *Extents*, 516, &c.

be sufficient to satisfy the debt.^k But the court of Exchequer will not make an order for the sale of lands, on the statute 25 Geo. III. c. 35: if goods sufficient to pay the debt have been seized under the extent.^l

The writ of extent, at the suit of the king, is either in *chief* or in *aid*. An extent in chief is an adverse proceeding by the king, for the recovery of his own debt: An extent in aid is sued out at the instance and for the benefit of the debtor to the crown, or his surety, for the recovery of a debt due to himself: in the former case, the king is the *real*, as well as *nominal* plaintiff; in the latter, he is the *nominal* plaintiff only.^m On a *judgment* in *scire facias* for the king's debt, or on an information for penalties in the court of Exchequer, the regular process of execution is an extent in *chief*, against the body lands and goods of the defendant:ⁿ or a *levari facias* may be issued, with a *capias* clause for taking his body:^o And, in the case of the king, there need not be any *scire facias* to revive the judgment, after a year and a day.^p So, on a *recogni-* [*1091] *zance* to the king, *if it be clearly forfeited, an extent may be issued in the first instance, against the body lands and goods of his debtor.^q

The king's remedy, for the recovery of *specialty* debts, is governed by the statute 33 Hen. VIII. c. 39.^r which enacts, that "all obligations and specialties, which shall be made for any cause or causes touching or in any wise concerning the king's most royal majesty, or his heirs, or to his or their use, commodity or behoof, shall be made to his highness and to his heirs, kings, in his or their name or names, by these words, *to the lord the king*, and to none other person or persons to his use, and to be paid to his highness by these words, *to be paid to the said lord the king, his heirs or executors*, with other words used and accustomed in common obligations; and that all such obligations and specialties, so to be made, shall be good and effectual in the law to all intents and purposes, and shall be of the same nature, kind, quality, force and effect, to all intents and purposes, as the writings obligatory taken and acknowledged according to the statute of the staple at *Westminster*, had at any time before the making of that act been taken, used, exercised and executed, against any lay person or persons.^s And that all such obligations and specialties, the debt whereof not being paid nor contented in the life of the king, shall come remain and be to the heirs or executors of the king, at the free liberty, disposition, assignment and appointment of the same king, to whom such obligations or specialties shall be made as aforesaid.^t And that all suits, process, judgments, decrees and executions, thereafter to be taken, pursued, or given for the king, in any of the king's courts mentioned in that act, of or upon any of the same obligations, shall be of the same or like strength, force, effect and intent in the law to all pur-

^k West, 76. 80. but see O. Bridg. 474.

^l 3 Salk. 286.

^m 3 Price, 40. West, 187, &c. 225, 8. C.

ⁿ West, 14. and see 8 Price, 683.

^o Append. Chap. XLII. § 2.

^p Gilb. Excheq. 125, 6. *Ante*, 1087.

^q 2 Salk. 603. and see Gilb. Excheq.

166, 7. 1 Price, 395. West, 316, &c.

^r Gilb. Excheq. 165, 6.

^s § 50. ^t § 51.

poses, only against all and all manner such person and persons as are bound in such obligations or specialties, as well spiritual as temporal, and against their heirs, successors, executors and administrators, and every of them, and against none other, as writings obligatory taken and acknowledged according to the statute of the staple at *Westminster*, at any time before the making of that act, had been used to be taken, exercised and executed, against any lay person or persons."^a On this statute, the king may proceed either by *scire facias*, which is the ordinary mode of proceeding when the debt is doubtful, or the debtor solvent, in which case an extent is the ultimate process of execution; or, upon an affidavit of his insolvency, and that the debt "is in danger of being lost," and the [*1092] *fiat* of the chancellor, or one of the barons of the Exchequer,^b the king may sue out an *immediate* extent in chief;^c so called, from its being issued in the first instance, without the intervention of a *scire facias*.^d And this latter is now become the common mode of proceeding on a bond, against the *principal* debtor, when the debt is in danger; but against *sureties*, it is more usual to proceed by *scire facias*.^e Though if a *scire facias* has issued on a bond, an immediate extent may afterwards issue, on an affidavit of danger; and the king may proceed thereon either by *scire facias* or extent, or by both.^f It seems to have been formerly holden, that on a bond or recognizance to the king, conditioned for the performance of covenants or other collateral things, a *scire facias* should first issue, and not an immediate extent.^g But it was afterwards decided, that on an affidavit of danger, and that the condition of the bond is broken, an immediate extent may issue in every case, as well where the bond is for the performance of covenants or other collateral acts, as where it is for the payment of a sum certain.^h But if it be doubtful whether the bond or recognizance be forfeited, then it seems a *scire facias* is the proper mode of proceeding.ⁱ And, when the debtor is solvent, the king has not an election to proceed against him either by extent or *scire facias*, but the latter is the only course.^j

For the recovery of a *simple contract* debt, the king may proceed either by action of *debt*,^k or, after it is recorded, by *scire facias*, or extent. But it is a rule, that writs of *scire facias* or extent must be founded on matter of record: And therefore, before a *scire facias* or extent can be issued for a simple contract debt, it must first be recorded; for which purpose a *commission* issues out of the court of Exchequer,^l under which an inquisition^m is taken, to find the debt; and the inquisition, when returned, becomes a matter of record.ⁿ The commission to inquire of the king's debts is of great antiquity,

^a § 53.

^b Append. Chap. XLII. § 3.

^c *Id.* § 4.

^d *Id.* § 5. and see West, 18. 47, 8. Gilb. Excheq. 168, &c.

^e West, 18.

^f Bunb. 58. and see Append. Chap. XLIII. § 1, &c.

^g Bunb. 74.

^h *Rex v. Bishop of Exeter*, West, 327.

ⁱ *Rex v. Moseley*, West, 325. and see Bunb. 203. West, 47, 8.

^j Gilb. Excheq. 166.

^k 3 Price, 288. 292.

^l 3 Inst. 136. Com. Dig. tit. *Action*, B. 1.

^m Append. Chap. XLII. § 6.

ⁿ *Id.* § 7. and see 5 Price, 614. for the manner of finding the debt due to the crown.

^o West, 20.

being mentioned, with the proceedings thereon, in the statute of *Rutland*,¹ and it is issued by the clerk in court to the crown,² and [*1093] directed to two commissioners, who are authorized to inquire, with the assistance of a jury, whether the defendant be indebted to the crown in any and what sum of money; and to return the inquisition taken thereon to the court. This commission is always executed in *Middlesex*;³ and is *tested* in the name of the chief baron, signed by the king's remembrancer, and sealed with the Exchequer seal.⁴ It may be issued and tested in vacation, but must be returnable in term.⁵ The *immediate* extent however, for a simple contract debt, which is founded on the inquisition taken under the commission, may and constantly does issue in vacation, before the commission is returnable; though it seems the commission ought to be actually returned into the office and filed, before the extent issues.⁶ No notice is given to the defendant, of the execution of this commission; and it is not usual to adduce any evidence of the debt before the jury, except the affidavit made for the purpose of obtaining the immediate extent, on which alone it is the practice for the jury to find the debt.⁷

This affidavit, which is called the affidavit of *danger*, must state the debt due to the crown, in what manner it arose, and that it is in danger of being lost;⁸ and it should contain not only a general allegation of the defendant's insolvency, but also some particular fact or instance, such as that he has committed an act of bankruptcy, or stopped payment, or absconded, or that a docket has been struck against him,⁹ &c. This affidavit may be sworn, either before a baron of the Exchequer in town, or a commissioner of the court in the country.¹⁰ The *fiat*, which is the warrant or authority for issuing the extent, may be obtained at any time, either in vacation or in term, by application to the chancellor of the Exchequer, or, as is more usual, to one of the barons;¹¹ nor is any motion in court necessary to be made for it in term time;¹² but if the extent be for a *bond* debt, the bond must be produced to the chancellor or baron, on his granting the *fiat*.¹³ The commission and inquisition thereupon, if the debt be by simple contract, or the bond, if there be one, being taken, with the affidavit of danger, to the chancellor of the Exchequer or one of the barons, he signs his name on the back of the commission, which is the warrant for issuing it;¹⁴ and at the same time signs the *fiat* for an extent, at the foot of the affidavit.¹⁵ It is [*1094] said to have been *decided, that an extent may be issued on an inquisition and *fiat*, *eight years* old; and no new affidavit or *fiat* is requisite, nor is any proceeding, by *scire facias* or otherwise, necessary to revive such extent.¹⁶

¹ 10 Edw. I. § 8. West, 21.

² West, 21.

³ West, 21. (c).

⁴ *Id.* 22. 3 Price, 279.

⁵ *Id.* 48. 242.

⁶ *Id.* 22.

⁷ *Id.* 51.

⁸ *Id.* 52. Append. Chap. XLII. § 8.

And for other forms of affidavits and

fiats for immediate extents in chief, see West, Append. 4, &c.

⁹ West, 54.

¹⁰ *Id.* 49. Append. Chap. XLII. § 9.

¹¹ West, 49.

¹² *Id.* 50. (a.) 290.

¹³ 3 Price, 278.

¹⁴ West, 49.

¹⁵ 1 Price, 395.

The writ of extent in *chief* issues out of the equity side of the court of Exchequer;^c and after reciting the judgment, recognizance, bond, or finding of the simple contract debt on the inquisition taken by virtue of the commission, commands the sheriff, to whom it is directed, to omit not by reason of any liberty, but to enter the same, and take the defendant; and to inquire by a jury, what lands and tenements, and of what yearly values, the defendant *had* on the day when he first became debtor to the crown, or at any time since, (or, in the case of a simple contract debt, what lands, &c. he now *hath*,) and what goods and chattels, and of what sorts and prices, and what debts, credits, specialties and sums of money, the defendant, or *any person in trust for him, or to his use*,^d hath in his bailiwick; and to appraise and extend all and singular the said goods and chattels, lands and tenements, debt, &c. and take and seize the same into the king's hands. It then directs the sheriff to summon before him such persons as he shall think proper, and examine them in the premises, and to return the writ to the court; with a *proviso*, that he do not sell the goods and chattels, till he shall be otherwise commanded.^e This writ, like the commission for finding a simple contract debt, is *tested* by the chief baron, signed by the king's remembrancer, and sealed with the Exchequer seal.^f And it is a rule, that an extent cannot be ante-dated; but must bear *teste* on the day it issues, though it be out of term; for, as mentioned above, it issues out of the equity side of the Exchequer, which is always open.^g The writ is always made returnable on a *general* return day; and a term must not intervene between the *teste* and return.^h If the *teste* of the extent be mistaken, it may be amended by the *fiat* of the baron:ⁱ But when an inquisition taken on an extent has been quashed for uncertainty, it is necessary to issue a new writ, the former having been returned.^k Before or after the return of the first extent, any number of extents may issue, with the same *teste* as the first, *that is, the date of the *fiat*: If they issue before the return [*1095] of the first extent, they may issue as a matter of course; if they do not issue till after the return of the first extent, a motion must be made in court to obtain them, on an affidavit of the circumstances.^l And any number of extents may issue into different counties, at the same time.^m

On the writ of extent, it is the duty of the sheriff to take the body of the defendant, unless directed to the contrary; and as it contains, like all other process at the suit of the crown, a *non omittas* clause, the sheriff may enter any liberty, for the purpose of executing it. He may also, if the doors be not open, break the party's house, either to arrest him, or to take his goods: but before he breaks it,

^c 2 Str. 749. Gilb. Rep. 222. Bunb. 164. S. C.

^d The words in *italics* were inserted, in consequence of a rule of court made in May 1712. See Book of Orders, No. 99. Man. L. Ex. Append. 234.

^e Append. Chap. XLII. § 2. 5. 10.

^f West, 56.

^g 2 Str. 749. Gilb. Rep. 222. Bunb. 164. S. C.

^h West, 58.

ⁱ *Id.* 59. and see 9 Price, 483.

^k 3 Price, 269.

^l Parker, 35. 176. 282. 3. West, 59. but see 7 Price, 238.

^m West, 59.

he ought to signify the cause of his coming, and make request to open the doors.^a The defendant being taken under an extent, cannot be bailed.^b And the king not being bound by the bankrupt laws, or insolvent debtor's act,^c a certificated bankrupt, or person discharged under an insolvent act, is not entitled to his discharge out of custody under an extent,^d even in *aid*.^e And for a similar reason it is holden, that a bankrupt is not entitled to be discharged, by virtue of the statute 5 Geo. II. c. 30. when arrested on an extent during the time of privilege.^f But where a bankrupt was arrested on a writ of extent, while actually attending to give evidence before commissioners of bankrupt, the chancellor, we have seen,^g discharged him, as being privileged from arrest at common law. A party in custody, however, may obtain a *habeas corpus*, to be brought up at his own expense, to attend the trial of his cause, under special circumstances, as where his identity is in question.^h When the crown is concerned, the courts, we may remember,ⁱ will not in general change the custody of its debtor, without the express consent of its officers: And the practice is said to be, for the crown to take its debtor out of any other custody; but the subject never takes his debtor out of the crown's custody, without the consent of the attorney general,^j even for the purpose of surrendering him in discharge of his bail in another action.^k Nor are the bail entitled to an *exoneretur*, on the ground that the defendant has been taken under an extent, and that the crown will not consent to a render.^l

[*1096] The next step to be taken by the sheriff, or the first, if the defendant cannot be found or is not meant to be arrested, is to impanel a jury, to inquire as to the defendant's lands and tenements, goods and chattels, &c.; for which purpose he is required to summon witnesses on the part of the crown; and if they do not attend, the court of Exchequer will attach them;^b and a witness must answer all questions, even though against his own interest, so as they do not subject him to any penalty or forfeiture.^c On the taking of an inquisition upon a writ of extent, all persons claiming an interest in the property sought to be extended may appear, and produce evidence, and cross examine the witnesses for the crown;^d and for that purpose the claimant may apply to the court, for an order to give reasonable notice of the execution of the writ.^e But in ordinary cases, no notice is given of its execution.

The lands of a debtor or accountant to the crown were liable to the debt at common law, as well as his body and goods.^f And under

^a 5 Co. 91. b. ^c West, 73. 83.

^d *Id.* 95. and see 8 Price, 671.

^e 1 Atk. 262. and see 8 Price, 671.

^f Bunb. 202. pl. 279.

^g *Id.* *Ex parte Temple*, 3 Rose, 22. and see West, 95. Man. L. Ex. 534.

^h *Ante*, *227.

ⁱ 1 Price, 403.

^j See Addenda to p. *311. post.

^k West, 95.

^l 5 Taunt. 503. Barnes, 223. but see West, 91.

^a 5 Taunt. 503. 1 Marsh. 166. S. C. *Ante*, 293.

^b Parker, 269. and see *id.* 271.

^c Parker, 270. and see stat. 46 Geo. III.

^d c. 37.

^e Bunb. 233. 3 Price, 454. West, 67, &c. 330, &c. S. C. and see stat. 1 Hen. VIII. c. 8. made perpetual by 3 Hen. VIII. c. 2.

^f 1 Vez. 269.

^g 3 Co. 12. b. Cro. Jac. 430. 3 Salk. 286. 2 Wms. Saund. 70. (*d.*) *Ante*, 1089.

an extent, the crown may take not only the legal estate of its debtor, but also trust estates,⁵ or an equity of redemption.^h But copyhold estates cannot be taken under it.ⁱ If the extent be against several, the lands of all or any of them are liable to be seized, as appears by the form of the writ.^k The time from which lands are bound, depends on the nature of the debt to the crown; which, we have seen,^l is either of record or not of record. Debts of record are founded on judgments or recognizances, or inquisitions taken and returned on commissions for simple contract debts: *Judgments* bind the lands, from the first day of the term of which they are recorded;^m *recognizances*, from the caption, or time they are entered into:ⁿ And it seems that *simple contract* debts, found on a commission, bind the lands from the time of their becoming of record, on the return of the inquisition.^o If the king's debt be prior on record, it binds the lands of the debtor, into *whose hands soever [*1097] they come; because it is in the nature of an original feudal charge upon the land itself, and therefore must bind every one that claims under it; and an execution may be taken out for such debt, though an *elegit* may have been issued at the suit of a subject:^p but if the lands were aliened, in the whole or in part, as by granting a jointure before the debt contracted, such alienee claims prior to the charge, and in that case the land is not bound.^q

Bonds to the king bind the lands, from the time they are entered into, by force of the statute 33 Hen. VIII. c. 39.^r *Simple contract* debts do not seem to have bound the lands at common law, before they were recorded, on a commission for that purpose, unless they were due from known public officers and accountants of the crown; in which case, they seem to have always bound the lands of the debtor, from the time when those debts accrued.^s And, by the statute 13 Eliz. c. 4. § 1. "all lands, tenements, profits, commodities, and hereditaments, which any treasurer or receiver of the courts of Exchequer, &c. or other officers, &c. therein mentioned, then had, or at any time thereafter should have, within the time whilst he or they, or any of them should remain accountable; should, for the payment and satisfaction unto the Queen's majesty, her heirs and successors, of his or their arrearages, at any time thereafter to be lawfully, according to the laws of this realm, adjudged and deter-

⁵ West, 129.

^h Forrest, 162. 1 Price, 207.

ⁱ Parker, 195.

^k Append. Chap. XLII. § 5. West, 136.

^l *nte*, 1089.

^m Dyer, 224, 5. 8 Co. 171. 2 Rol. Abr. 156, 7. and see Gilb. Excheq. 88. Bac. Abr. tit. *Execution*, K. 2 Wms. Saund. 7. (5.) 70. (e.) West, 123. But it is said, that if a farmer of the king do not pay his rent, and the king recover it in *debt*, his land which he had on the day of the writ brought and after, into whose hands soever it comes, shall be put in execu-

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tion. 19 Hen. VI. 38. B. 2 Rol. Abr. 157.

ⁿ Gilb. Excheq. 83, 4. and see 2 Wms. Saund. 7. (5.) and the cases there cited.

^o Wightw. 44. and see West, 128, 9.

^p 2 Rol. Abr. 156, 7. Gilb. Excheq. 88. 91. Bac. Abr. tit. *Execution*, K. 2 Wms. Saund. 70. (e.)

^q 2 Rol. Abr. 156, 7. Gilb. Excheq. 91. Bac. Abr. tit. *Execution*, K. and see West, 138, &c. Man. L. Ex. 536. &c.

^r § 50. and see Gilb. Excheq. 88, &c. Bac. Abr. tit. *Execution*, K. 2 Str. 754. 2 Wms. Saund. 70. (e.)

^s West, 123.

mined upon his or their account, (all his due and reasonable petitions being allowed,) be liable to the payment thereof, and be put and had in execution for the payment of such arrearages or debts, to be so adjudged and determined upon any such treasurer, &c., in like and as large and beneficial manner, to all intents and purposes, as if the same treasurer, &c. upon whom any such arrearages or debts should be so adjudged or determined, had, the day he became first officer or accountant, stood bound by writing obligatory, having the effect of a statute of the staple, to her majesty, her heirs or successors, for the true answering and payment of the same arrearages or debts." By this latter statute, debts due from the officers enumerated therein, bind the lands, if incurred at any time during their continuance in office, from the time of entering into the same.

By the statute 33 Hen. VIII. c. 39. § 74. "if any suit be commenced or taken, or any process awarded for the king, for the [*1098] recovery of any of his debts, then the same suit and process shall be preferred before the suit of any person or persons; and that the king, his heirs and successors, shall have first execution against any defendant or defendants, of and for his said debts, before any other person or persons; *so always that the king's suit be taken and commenced, or process awarded for the said debt, at the king's suit, before judgment given for the said other person or persons.*"^a This clause of the statute is not confined in its operation to bond debts only, but extends to all debts and executions at the suit of the king:^b And it is holden to be restrictive upon the old prerogative, and introductive of a new law; for *ita quod, so always that the king's suit, &c.* make a condition precedent, and a limitation: Hence therefore, a judgment and execution executed by *elegit*, before any suit or process commenced by the king shall be preferred to the extent of the king, issuing on a bond debt, bearing date before the subject's judgment, and assigned to the king before the subject's execution.^c On the other hand, if the crown suit be commenced, or *fiat* for an extent granted, before judgment given for the subject, the execution of the crown is to be preferred:^d And it is said, that if the subject's debt be by statute staple or judgment, prior to the king's debt, and the king extend the lands first, the subject shall not, by any after extent, take them out of his hands.^e So, if after an extent on such judgment, the king's extent come before the subject has the possession delivered to him by a *liberate*, the king's extent shall, it is said, be preferred, and the subject wait till the king's debt be satisfied.^f So, lands bargained and sold by commissioners of bankrupt to the assignees, may it seems be taken under an extent, the *teste* of which is subsequent to the bargain and sale, but prior to the enrolment.^g

^a See 2 Wms. Saund. 70. c. f.

^b 7 Co. 18. b.

^c Hardr. 23. and see Gilb. Excheq. 91. West, 160. but see Dyer, 67. b. 2 Wms. Saund. 70. f.

^d West, 102. and see 16 East, 278. (a.)

^e Gilb. Ex. 91. but see West, 151, &c.

^f Gilb. Excheq. 91, 2. but see West, 154, &c.

^g West, 149.

With respect to *personal* property, it is holden that under an extent, all the goods and chattels of the crown debtor, whether real or personal, may be taken, except things necessary for the support of himself and his family;^c and also except beasts of the plough, if there be other chattels sufficient.^d Chattels *real*, as terms for years, estates by *elegit*, &c. may be either extended at their yearly value, as lands of the debtor, or appraised at a gross price, as part of his *goods and chattels.* In either case they are bound, like [*1099] other chattels, from the *teste* of the extent only.^e Under an extent against several, the separate goods of each may be taken, as appears by the form of the writ:^f And, upon an extent against one partner, the crown may seize goods being the property of the partnership: but the crown can sell the interest only of the partner against whom the extent issues, which is his share of the surplus, after payment of the partnership debts.^h The jury therefore ought, in a case of this kind, to return the goods seized, as the property of the partnership.ⁱ

An extent for the king's debt binds the property of his debtor's goods, into whose hands soever they come, from the *teste* of the writ, or *fiat* of the baron on which it issues:^k For though by the statute 29 *Car.* II. c. 3. § 16. no execution shall bind the property of goods, but from the time of the delivery of the writ to the sheriff, yet this statute does not extend to the king, who is not named therein.^l And as no laches are imputable to the king, he is not it seems bound by an intervening sale in market overt.^m But a warrant from commissioners of taxes does not bind the goods, until it be actually executed by seizure:ⁿ And when goods are *bona fide* sold, or fairly assigned by the king's debtor to trustees for the benefit of his creditors, before the *teste* of the extent, they cannot be taken under it; even though the debtor, in the latter case, was a trader within the bankrupt laws, and the assignment was an act of bankruptcy, and void as against the assignees.^o But goods fraudulently conveyed away to defeat the execution, may be taken under an extent, as well as under a *feri facias*.^p A *factor*, to whom goods have been sent for sale, and who has accepted bills of exchange, drawn on him by his principal, to the amount of their value, has a lien on such goods, and the purchase money; which lien is available against the crown, where the goods or money have been seized under an extent against the principal, for a debt due to the crown.^q So, goods pawned or pledged before the *teste* of an extent, cannot be

^c 2 Rol. Abr. 160. l. 5.

^d *Id. ibid.* Com. Dig. tit. *Dett*, G. 3.

^e 8 Co. 171.

^f *Id. ibid.* Man. L. Ex. 542.

^g Append. Chap. XLII. § 5. West, 117. 169. *Ante*, 1096.

^h Wightw. 51.

ⁱ West, 117.

^k 8 Co. 171. 2 Rol. Abr. 156, 7. 7 Vin. Abr. 104. West, 327. S. C. Gilb. Excheq. 90. Bac. Abr. tit. *Execution*, K. Bunb. 39. 2 Str. 754. Gilb. Rep. 222. S. C. Parker, 125. 2 Blac. Rep. 1251. 5 Price, 428. 433,

4. and see West, 96, 7. Man. L. Ex. 543, &c.

^l W. Jon. 202. Gilb. Excheq. 90. Bac. Abr. tit. *Execution*, K. Bunb. 202. 3 Atk. 739. 1 Ves. 196. Co. B. L. 358, 9.

^m See West, 96. Man. L. Ex. 545. and the cases there cited.

ⁿ 2 Str. 978.

^o 3 Price, 6. West, 115. S. C. and for the pleadings in this case, see *id.* Append. 111.

^p West, 115, 16. *Ante*, 1043, &c.

^q 6 Price, 369.

[*1100] taken under it; because the pawnee or *bailee has a special property in them;^r nor, for the same reason, goods demised or let to another for a term certain, during the term:^r But it seems that goods pawned before the *teste* of the extent may be taken as against the pawnee, on satisfaction of the pledge:^r and after the extent, a pawnee of goods cannot safely re-deliver them to the pawner; for the interest of the latter is bound by the *teste* of the writ.¹

The property of goods, though *bound*, not being *altered* by a *distress* for rent, until the goods are actually sold, it has been determined, that an extent against the king's debtor, *tested* after a distress taken for rent, with notice to the tenant, and appraisement of the goods, but before sale, shall prevail against the distress:^u And the crown, we have seen,^r is exempted from the operation of the clause in favour of landlords, in the statute 8 Anne, c. 14. by an express provision; which has been holden to apply to extents in *aid*.^v So the crown, not being named in the acts relating to *bankrupts*, is not bound by them; and as the bankrupt's property is not altered before assignment, the commissioners having only a power to assign it, an extent will bind the property of the bankrupt from the *teste* of the writ, until an actual assignment by the commissioners:^r And if the extent and assignment be both *tested* on the same day, the crown it seems shall be preferred.^a But where goods taken under a distress for rent are sold,^b or the goods of a bankrupt assigned by the commissioners,^c before the *teste* of an extent, they cannot be taken under it; because the property in these cases is absolutely transferred to third persons: and a provisional assignment is sufficient to bar the crown.^d

In the case of an *execution*, it is a rule, that when the king and a subject stand in equal degree, and the property of the debtor remains unaltered, the king's prerogative must prevail.^e *Quando jus do-* [*1101] *mini *regis et subditi insimul concurrunt, jus regis præferri debet*.^f therefore, if an extent at the suit of the crown be *tested* before or on the day of delivering the subject's execution to the sheriff, the former shall have the preference.^g But it has been doubted, whether goods are liable to an extent, issued for the debt of the crown, after they have been taken by the sheriff under a *fieri facias*, and before they are sold. On the one hand it is said, that as by the common law, abridged as it is by the statute of frauds, the

^r Bro. Abr. tit. *Pledges*, pl. 28. Parker, 118, 19. and see 7 Durnf. & East, 11, 12. 15 East, 607. 5 Burn. & Ald. 826. 3 Stark. Nt. Pri. 130. S. C.

^u Bro. Abr. tit. *Pledges*, pl. 28. tit. *Execution*, pl. 107. and see 8 East, 476. 479. *Ante*, 1042.

^v 1 Bulst. 29. and see Man. L. Ex. 545.

^a Bunb. 42. 269. Parker, 112. 141. and see Brady on Distresses, 117.

^b *Ante*, 1053, 4.

^c 2 Price, 17. 6 Price, 19. *Ante*, 1054. But the goods of a tenant are it seems liable to satisfy a year's rent, notwithstanding an outlawry in a civil suit, Bunb.

194. 7 Durnf. & East, 259. *Ante*, 1054. but see Bunb. 5. *semb. contra*.

^r 2 Show. 481. 7 Vin. Abr. 104. West, 327. S. C. Bunb. 33. 202. 2 Str. 978. Parker, 126. and see Co. B. L. 7 Ed. 358, 9.

^u 2 Show. 481. Bunb. 33. Parker, 126. West, 115.

^v Parker, 118.

^a 2 Show. 481. 7 Vin. Abr. 104. West, 327. S. C. Bunb. 33. 202. 2 Str. 978. Parker, 126. and see West, 115. Man. L. Ex. 544.

^f 1 Atk. 95. and see 14 Ves. 87.

^g 4 Durnf. & East, 411.

^h 9 Co. 129. b. ⁱ *Id. ibid*.

property of the debtor's goods is bound by the delivery of the writ to the sheriff, there then remains no property in the debtor, on which the prerogative of the crown can attach:^a and accordingly it has been determined, in the courts of King's Bench¹ and Common Pleas,² that if goods be taken in execution, on a *fiery facias* against the king's debtor, and before they are sold an extent issues at the king's suit, grounded on a bond debt, and tested after the delivery of the *fiery facias* to the sheriff, these goods cannot be taken upon the extent. But on the other hand it seems, that by the ancient prerogative, the crown was entitled to priority of execution; and must have been first satisfied its debts, before the subject could have taken out any execution at all: and though the property of goods be so far bound by the delivery of the writ to the sheriff, that as between subject and subject, it determines the question of priority, yet as against the crown, it is said, the property is not altered, until it be actually sold; and accordingly it has been determined by the court of Exchequer, that if an extent issue against the king's debtor, whilst the goods remain in the sheriff's hands on a *fiery facias*, and before they are sold, though the extent be not tested till after the delivery of the *fiery facias* to the sheriff, the king is entitled to the preference.¹ And, in the King's Bench, process sued out by the crown against a defendant to recover penalties, upon which judgment for the crown is afterwards obtained, entitles the king's execution to have priority, within the statute 33 Hen. VIII. c. 39. § 74. before the execution of a subject, issued on a judgment recovered against the same defendant prior to the king's judgment, but subsequent to the [*1102] commencement of the king's process; the king's writ of execution having been delivered to the sheriff, before the actual sale of the defendant's goods under the plaintiff's execution.² But an extent delivered to a sheriff, on the day on which goods seized under a *fiery facias* were sold and delivered to the purchasers, but which extent was delivered subsequently to the sale and delivery of the goods, is not entitled to priority over the writ of *fiery facias*.³

Debts owing to the king's debtor may be found under an extent,⁴ whether due on record or specialty, or only on simple contract.⁵ And it is now the constant practice to find debts due to the king's debtor, on bills of exchange and promissory notes;⁶ though it was formerly otherwise.⁷ And, under an extent against several, debts due to any one of them may be found;⁸ or, under an extent against

^a 4 Durnf. & East, 411. but see West, 101. 104

¹ *Rorke v. Dayrell*, 4 Durnf. & East, 402.

² *Uppom v. Sumner*, 2 Blac. Rep. 1251. and see 3 Mod. 236. Comb. 123. Parker, 262. Com. Dig. tit. *Delt*, G. 8.

³ *Rez v. Wells & Allnut*, 16 East, 278. 6 Price, 114. 144. 8 Price, 293. per Richards Chief Baron, and Graham & Garrow Barons, *Wood Baron Dissentiente*: and see Dyer, 67. b. 2 Rol. Rep. 295. Comb. 452. 2 Show. 481. Bunb. 8. Parker, 262. 1 Bur. 36. West, 98, &c. 8 Price, 374, &c. This point came before the court of King's

Bench, on a special verdict, in the case of *Thurston v. Mills*, 16 East, 254. but was not determined, the case being decided on the form of the action.

⁴ 1 East, 338. and see 8 Price, 364.

⁵ 1 Gow, 39. 3 Moore, 740. 1 Brod. & Bing. 370. S. C. and see 1 Chit. Rep. 643. (a.) *Ante*, 1057.

⁶ 21 Hen. VII. 12. 16. Godb. 291.

⁷ Godb. 296.

⁸ West, 27, 8. 164, 5. And as to the mode of finding bills or notes, when they are not due at the time of taking the inquisition, see *id.* 165, &c. *Id.* 169.

one, debts due to that one and others jointly.* Debts are in general bound, in like manner as goods and chattels, from the *teste* of the extent;† and therefore, a mere assignment of a debt to the assignees of a bankrupt, between the *teste* of the extent and caption of the inquisition, will not discharge the debtor, as against the crown:‡ but the payment of a debt to the crown debtor, after the issuing of the extent and before the caption of the inquisition, will discharge the party paying it, without notice of the crown process.⁴ So, payments of money made *bond fide* by the crown debtor, before the caption of the inquisition, are it seems good payments; and the money cannot be recovered back from the creditors, to whom it has been so paid.⁵

The sheriff is required by the writ of extent, to seize and take into the king's hands, all and singular the goods and chattels, lands and tenements, debts, credits, specialties and sums of money, appraised and extended by him under the same; and it is said to be his duty to seize all the defendant's goods, though a part only would be sufficient to satisfy the debt;⁶ and also to seize his lands, though he have goods [*1103] sufficient for that purpose:⁷ in which respect an extent differs from an *elegit*, upon which, if the goods and chattels are sufficient to satisfy the plaintiff's demand, the sheriff, we have seen,⁸ ought not to extend the lands. But when goods and chattels of the debtor have been seized on an extent, to an amount, according to the appraisement, beyond what is sufficient to satisfy the debt due to the crown, the debtor's lands cannot be sold.⁹ The seizure of the lands is merely nominal; and the sheriff does nothing but find them, through the *medium* of a jury, which finding is in effect the seizure:¹⁰ and the sheriff is directed only to *seize* the goods, and not to *sell* them, under the extent, as appears by the *proviso* at the end of the writ.¹¹ The sheriff has no power, on an extent against the crown debtor, to collect or levy the debts due to him;¹² he is merely to seize them, which seizure is a seizure in law:¹³ and if he receive such debts, he cannot make it the ground of a charge for poundage.¹⁴

The inquisition taken by the sheriff, under an extent, is an office of *intituling*, not of *information* or *instruction* merely.¹⁵ It must therefore be direct, positive, and traversable. But it need not state the interest of the parties, with the precision required in a plea: Thus, a particular estate may be found, without shewing from what

* *Id.* 170. 5 Price, 464. 7 Price, 570. S. C. in Error.

† 7 Vin. Abr. 104. West, 327. S. C.

‡ Bunb. 265. West, 329. S. C. and see *id.* 162, 3. Man. L. Ex. 546, 7. 8 Price, 576. but see 2 Price, 396. West, 163, 4. S. C.

⁴ West, 172, 3. Man. L. Ex. 548.

⁵ West, 75. but see Man. L. Ex. 549, 50.

⁶ West, 76. 80. but see O. Bridg. 474.

⁷ Salk. 186. *Ante*, 1090.

⁸ *Ante*, 1074.

⁹ 3 Price, 40. *Ante*, 1090.

¹⁰ West, 74.

¹¹ Append. Chap. XLII. § 2.

¹² West, 171. and see *id.* 74. Man. L. Ex. 518. 8 Price, 587.

¹³ 8 Price, 587. *Ante*, 1084, 5.

¹⁴ There are two sorts of offices: the one vests the estate and possession of the land, &c. in the king, where he had only right or title before; the other is, when the estate is lawfully in the king before, but the particularity of the land does not appear of record, so that it may be put in charge: The first of these is called the office of *intituling*: the second, the office of *instruction*. 10 Co. 115. a. and see Gilb. Excheq. 109. Bul. Nv. Pri. 215. Man. L. Ex. 582, 3.

it is derived. The inquisition must find facts, and not evidence; and it should not be argumentative. Finding a matter of law is surplusage; which does not however destroy the effect of that which is properly stated.^b The inquisition is annexed to the sheriff's return, which should regularly be filed in the king's remembrancer's office, on the *quarto die post* of the return day;^c though it may be filed before, when it is desirable to institute any further proceedings, founded not upon the return of the extent, but upon the inquisition, as to issue an extent in the next degree.^k Specialties used formerly to be annexed to the inquisition, and returned with it; but the sheriff now usually keeps them, till called upon to deliver them to the solicitor for the crown.^l

*It may here be proper to say a few words of the writ of [*1104] *diem clausit extremum*; which is a special writ of *extendi facias*, or extent in *chief*, issuing after the death of the king's debtor, against his lands and chattels. This writ, which was formerly included in the *long writ*,^m and seems to be founded, at least as to the goods, on *magna charta*,ⁿ sets out with stating the death of the debtor, from whence it derives its name; and directs the sheriff to inquire, by means of a jury, when and where he died, and what goods and chattels, debts, credits, specialties and sums of money, and what lands and tenements, he had at the time of his death, &c. and to cause the same to be appraised and extended, and seized into the king's hands; and it concludes in the same manner as the extent in chief.^o It has been said, that a writ of *diem clausit extremum* must bear *teste* in term;^p but this seems to be a mistake, it being sometimes tested in vacation.^q

Whenever an extent might have issued against the king's debtor in his life time, a writ of *diem clausit extremum*, which is an extent against his lands and chattels, may issue after his death.^r And this writ may issue against the property of a simple contract debtor of the crown, on a commission found after his death.^s But no *diem clausit extremum* can regularly issue against the estate of a person who was not debtor to the crown, or found in his life time to be debtor to the king's debtor.^t

The writs of extent hitherto spoken of are principally in the *first* degree, being issued for the recovery of debts immediately due to the crown; but when an inquisition is taken thereon, under which debts are found and seized into the king's hands; the crown, if they are not paid, may proceed for the recovery of them, either by *scire facias*, (which is the ordinary mode of proceeding,) or, on an affi-

^b Man. L. Ex. 535. 605.

^c *Id.* 551.

^d *Id.* 552.

^e West, 74.

^f Gilb. Excheq. 118. *Ante*, 1087.

^g Chap. 18. West. 319, 20. and see stat.

33 Hen. VIII. c. 39. § 75, 6, 7.

^h Append. Chap. XLII. § 12.

ⁱ Hardr. 125, 6. and see Bunb. 39. 2 Str. 749., 756. R. H. 1 & 2 Geo. IV.

Excheq. 9 Price, 86.

^j Man. L. Ex. 519.

^k Bunb. 119.

^l Parker, 95.

^m *Id.* 16. and see Com. Dig. tit. *Dell*, G.

5. 7. West, 320. Man. L. Ex. 519, 20. 525.

And for the mode of pleading *plene administravit* and a retainer by an executor, on a writ of *diem clausit extremum*, see 5 Price, 621.

davit of danger,^a and a baron's *fiat*,^b by *immediate* extent,^c which is called an extent in the *second* degree: And upon such affidavit and *fiat*, an *immediate* extent, we have seen,^d may issue before the extent under which the debts are found is returnable, though it must be actually returned before the second extent can issue. In like manner, when debts are found and seized into the king's hands, [*1105] under an extent in *the second* degree, an immediate extent may issue for the recovery of them, if not paid, on an affidavit of danger and baron's *fiat*, which is called an extent in the *third* degree: And it seems that on an extent in *chief*, the crown may seize debts found to be due to its debtor, &c. *in infinitum*,^e but, on an extent in *aid*, debts cannot be seized beyond the *third* degree.^b In reckoning the degrees however, on an extent in *aid*, the debt due to the debtor of the crown debtor, for which the extent originally issued, is, according to a late case, considered as the first degree: In that case, A. was the original crown debtor, B. was indebted to A., C. to B., and D. to C.; and on an extent against C., which had issued after extents against A. and B., the debt due from D. to C. had been seized; and the court held that this was properly done, and that the debt due to the crown from its debtor was not to be counted, in reckoning the degrees.^e

For the purpose of obtaining an extent, in the *second* or any subsequent degree, it is not necessary to swear to the fact of the debt being due from the former debtor, such debt being found by the inquisition against him, which therefore need not be stated in the affidavit.^d The writ of extent in the *second* degree begins by stating the debt due to the king from his debtor, and, if it be a simple contract debt, the inquisition taken on the commission for finding it; after which it recites the inquisition, by which the debt is found to be due to the king's debtor, and that the same remains unpaid; and then proceeds with the mandatory part of the writ, which is similar to that in the extent in *chief*.^e Under this writ, the sheriff is to take the body, lands, and goods, &c. of the debtor to the king's debtor, in the same manner as under an extent in *chief* against the original debtor to the crown, which has been already treated of. But the lands which the sheriff is directed to seize under an extent in the *second* degree, are bound merely from the recording of the debt, from the debtor against whom it issues, under the inquisition against him; unless indeed such debt be owing on a judgment or

^a Append. Chap. XLII. § 11.

^b *Id.* § 11. (a).

^c Bunb. 24. 127. 134.

^d *Ante*, 1093.

^e Bunb. 303. and see Gilb. Excheq. 177, 8 Com. Dig. tit. *Debt*, G. 15.

^b Parker, 259, 60. West, 302, 3. and see R. H. 13 Car. 1. § 3. West, Append. 125. Man. L. Ex. Append. 230.

^c 1 Price, 95. and see 8 Price, 293. 386. 683. But see West, 299. where it is said, that as there is no other case in the books in which extents in *aid* have been carried, so far, it demands some consideration. It

should be observed however, in support of the rule established by the above case, that the object of an extent in *aid* is to recover the debt due to the crown debtor from his debtor, which may therefore be properly considered as a debt in the first degree, although an extent *pro forma* issues for the debt due to the crown.

^d West, 245. And for the form of an affidavit and *fiat* for an extent in *chief* in the *second* degree, see Append. Chap. XLII. § 11. West, Append. 25, 6.

^e Append. Chap. XLII. § 20. West, Append. 27. 29.

recognizance, in which case the *crown of course takes [*1106] the lien of the plaintiff in the judgment, or conusee in the recognizance, on the land of the defendant or conusor, which they had at the time of the judgment entered, or recognizance acknowledged.^f

Extents in *chief*, of which we have hitherto spoken, take place *inter se*, according to their *teste*,^g and shall be preferred to extents in *aid*.^h And an extent in *chief* in the *second* degree has been preferred to an extent in *aid*, of a prior *teste*, where the same effects had been seized under both writs, although the inquisition on the latter was taken before that on the former, and the *venditioni exponas* on the extent in *aid* was *tested* before that which issued on the extent in *chief*.ⁱ Nor is it necessary that the crown, in proceeding to recover the debts of its debtor, by extent within the degrees, should first apply the immediate debtor's proper effects, in discharge of its debt, before it resorts to the debtor's debts.ⁱ But, when the extent in *chief* has been satisfied, the parties prosecuting the extent in *aid* should apply to the court, by motion, to be paid out of the overplus, if any, which, under the 57 Geo. III. c. 117. § 2., is directed to be paid into court, to abide their orders respecting it.ⁱ

An extent in *aid*, which will next be treated of, is a writ issued at the instance and for the benefit of the crown debtor, for the recovery of his own debt;^k or it may be had against a principal debtor to the crown, at the instance and for the benefit of his *surety*, who has paid the crown debt.^l In these cases, the king is merely the *nominal* plaintiff.^m The foundation of an extent in *aid* is a debt due to the crown from its debtor, for which an extent in *chief* has issued against him: And, before the statute 57 Geo. III. c. 117. an extent in *aid* might have been obtained by persons indebted to the crown by *simple contract* only, as well as for a specialty debt, or debt of record;ⁿ and also for debts due to the crown, on bonds given by *traders* for duties, and by *sub-distributors* of stamps, and *sureties* only who had not been damnified, or for insurance companies, &c. But now, by the above statute, "it shall not be lawful for any person or persons, *companies or societies of persons, cor- [1107] porate or not corporate, who shall or may be indebted to his majesty by *simple contract* only; nor for any such person or persons, companies or societies, who shall or may be indebted to his majesty by bond, for answering, accounting for, and paying any particular duty or duties, or sum or sums of money, which shall arise or become due and payable to his majesty, from such person or persons, companies or societies respectively, for and in respect and in the course of his or their particular *trades*, manufactories, professions, busi-

^f West, 247.

^g Parker, 281. and see Gilb. Excheq. 67, &c.

^h Parker, 281, 2. and see West, 117, 18.

ⁱ 8 Price, 683.

^k Bunb. 24. 127. 134. and see 8 Price, 682.

^l West, 13, 14. 307, &c. Man. L. Ex. 563, &c. and see 8 Price, 385. *in note*.

^m West, 14. *Ante*, 1090.

ⁿ West, 267. 273. And for the cases in general, in which an extent in *aid* might have been obtained before the statute 57 Geo. III. c. 117. see *id.* 265, &c.

nesses or callings; nor for any *sub-distributor* of stamps, who shall have given bond to his majesty; nor for any person who shall have given bond to his majesty, either jointly or separately, as a *surety* only for some other debtor to his majesty, until such surety shall have made proof of a demand having been made upon him on behalf of his majesty, in consequence of the non-performance of the conditions of the bond by the principal, and then only to the amount of the said demand; to sue out and prosecute any extent or extents in *aid*, by reason or on account of any such debt or debts to his majesty respectively, for the recovery of any debt or debts due to such person or persons, companies or societies, or to such sub-distributor of stamps or surety as aforesaid; and that all and every commission and commissions to find debts, extent and extents in *aid*, and other proceedings which shall be so issued or instituted at the instance of or for such simple contract or bond debtor or debtors respectively, and all proceedings thereupon, shall be null and void.^o Provided always, that nothing therein contained shall extend or be construed to extend to preclude or prevent any persons who shall or may become debtor or debtors to his majesty by simple contract only, by the collection or receipt of any money arising from his majesty's revenue, for his majesty's use, from applying for and suing out any commission or commissions, extent or extents in *aid*, in case one or more of such persons shall be bound to his majesty, by bond or specialty of record in the said court of Exchequer, for answering, securing, paying over, or accounting for to his majesty, the particular duties or sums of money, which shall constitute the debt that may be so then due from such person or persons to his majesty.^o Provided nevertheless, that no extent in aid shall be issued on any bond given by any person or persons, as a surety or sureties, for the paying or accounting for any duties which may become due to his majesty, from any body or society, whether incorporated or otherwise, carrying on the business of in- [*1108] surance against any risques, either of fire or of any other kind whatever."^p

By the above statute an extent in *aid* cannot now be had by persons indebted to the crown by *simple contract* only, unless it be for a debt due from collectors or receivers of his majesty's revenue, and one or more of them be bound by bond or specialty of record in the Exchequer, for payment of the same. But an extent in aid may still be had for any debt of record, or specialty debt; except on such bonds as are particularly mentioned in the statute. And bankers, who have money in their hands, arising from the land and assessed taxes paid into their house, for the purpose of being paid over to the Exchequer, on account of a receiver general, for whom they have given bond to the crown, are still entitled to sue out an extent in aid.^q When a party is entitled to the benefit of an extent in aid, he may still issue it for a simple contract debt due to himself; the statute having introduced no distinction with respect to the

^o § 4.

^p § 5. The above statute does not extend to the *prosecution* of extents in other

cases, if commenced before it was passed.

^q Price, 144.

^r Price, 633.

nature of the debt due to the crown debtor.^r Nor is any motion in court necessary, in order to obtain an extent in aid for the recovery of a simple contract debt;^s though it was formerly otherwise.^t And it may be sued out by a crown debtor, for a debt due to himself and others jointly;^u and if several are jointly indebted to the crown, they may sue out an extent in aid against the debtor to any one or more of them; as, under an extent in chief against several for a joint debt, debts due to any one of the parties may be seized into the hands of the crown.^v

This writ, however, can only be had for a debt *originally* due to the king's debtor or accountant: For, by rule of *Hil. 15 Car. I.* "no debts shall be found by inquisition, for the king's debtors or accountants in aid, save such as are originally due to them *bonâ fide*, without any manner of trust: and he who desireth any debt or debts to be found by inquisition in his aid, shall make oath, that he is justly indebted unto A, one of the farmers of his majesty's customs, &c. and that the same is a just and true debt, originally due to the said A. *bonâ fide*, without any manner of trust; and that the said debt hath not been put in suit in any other court, and that he hath not received the same, nor any part thereof, except so much, &c.; *and that C. is justly indebted to him the said B. originally [*1109] and *bonâ fide*, without trust; and that C. is much decayed in his estate, so that unless a speedy course be taken against him, the said debt by him owing is in great danger to be lost." Therefore, if A. be indebted to B. who assigns to C. before the extent issues against C. an extent obtained against A. shall be discharged.² And where bonds are taken in the king's name, payable to his farmers, receivers, &c. they shall, before any extents go forth, make oath or certify under their hands to the court, that such bonds are, and at the time of taking the same were, for just and true debts, originally owing to themselves *bonâ fide*; and that they are not in trust, or for the benefit of any other.^a It is also a rule,^b that "no debts without specialty shall be found by inquisition, for debts in *aid*, unless it be by order upon motion in open court, and except it be for debts due to the king's farmers:" But this latter rule appears to have now fallen into disuse.^c

An extend in *aid* is in effect an extent in the *second* degree; and being issued without any previous suit, is always *immediate*. There is indeed a rule,^d that "no *immediate* process of extent shall be awarded for debts in *aid*, but in cases of extremity, and upon oath

^r Man. L. Ex. 577.

^s 2 Price, 15.

^t R. H. 15 Car. I. § 5. R. M. 3 W. & M. in *Seac. West*, 126, 7. Man. L. Ex. Append. 230. 234.

^u West, 273. Man. L. Ex. 577. *Ante*, 1102.

^v *Id. ibid.*

^a Gilb. Excheq. 174, 5. West, Append. 124, 5. Man. L. Ex. Append. 229, 30.

^b Bunb. 225.

^c R. H. 15 Car. I. § 8. in *Seac. Gilb. Excheq.* 179. West, Append. 126. Man. L. Ex. Append. 231.

^d R. H. 15 Car. I. § 5. in *Seac. Gilb. Excheq.* 176. West, Append. 126. Man. L. Ex. Append. 230. and see R. M. 3 W. & M. in *Seac. West*, Append. 126. Man. L. Ex. Append. 234. Hardr. 226.

^e 2 Price, 13. West, 267. S. C.

^f R. H. 15 Car. I. § 6. West, Append. 126. Man. L. Ex. Append. 230.

to be taken as before mentioned:^{22c} But it is now issued of course, without any motion in court,^f on an affidavit of danger. And where a crown debtor is entitled to this process, it is not necessary, by the practice of the court, that he should have the sanction of the revenue solicitors, or of the officers of any of the revenue boards.⁵ This however, being a prerogative process, is always under the care of the court of Exchequer, who have a discretionary power over their own rules.^h

In order to obtain an extent in *aid*, an extent *pro forma* is sued out against the debtor to the crown;ⁱ upon which an inquisition^k is taken: and if it be found thereby, that another person is indebted to him, the court or a baron, on an affidavit^l that the debt is in danger, will grant a *fiat*,^m or warrant for an *immediate* extent in aid.ⁿ The [*1110] extent *pro forma* against the crown debtor does not direct the sheriff to seize his body, goods and chattels, lands and tenements; but omits these words, and directs the sheriff merely to seize his debts, credits, specialties, and sums of money, in whose hands soever they may be.^o The affidavit for an extent in aid states first, the debt due to the crown from its debtor, who is the prosecutor of the extent in aid; secondly, the debt due to the crown debtor from his debtor, who is the defendant in the extent in aid; thirdly, that such debt is in danger of being lost, from the insolvency of the defendant; fourthly, that the debt due to him is a debt originally and *bona fide* due to him, without trust; fifthly, that it has not been put in suit in any other court; and lastly, by a late order of the court of Exchequer,^p that unless the process of extent, for the debt due to the party applying for it from his debtor, be forthwith issued, the debt due to the crown from the party applying, will be in danger of being lost to the crown. If the debt be by *bond*, it sets out the penal part of the bond; and usually proceeds to state that the obligor has received money, for which the party is accountable by the condition of the bond.^q And it is not necessary, since the statute 57 Geo. III. c. 117. that the affidavit made to obtain the *fiat* of a baron for an extent, should contain any allegations tending to shew that the party on whose behalf the application is made, is entitled to use the process on his behalf, or that it should set out the condition of the bond for that purpose: It is sufficient that the baron be satisfied, that there is ground for his granting a *fiat* for the extent.^r

In the case of a simple contract debt to the crown, a commission^s and inquisition^t are engrossed; the statement of the debt being taken therein from the affidavit: An extent *pro forma* against the crown

^{22c} *Ante*, 1108.

^f *Id. ibid.*

⁵ 3 Price, 75.

^h Bunb. 134.

ⁱ Append. Chap. XLII. § 15.

^l *Id.* § 17.

^k *Id.* § 18. And for other forms of affidavits and *fiats* for extents in aid, see West, Append. 33, &c.

^m Append. Chap. XLII. § 19.

ⁿ Bunb. 24. 127, 8, 134.

^o West, 15. and see *id.* 264. 292. Man.

L. Ex. 569.

^p T. 3 Geo. IV. in *Scac.* Previously to this order, it was deemed sufficient to swear, that the crown debtor was thereby less able to pay the debt due to the crown.

^q West, 275, 6. Man. L. Ex. 575.

^r 9 Price, 311.

^s Append. Chap. XLII. § 6.

^t *Id.* § 7.

debtor, and inquisition thereon, are also engrossed, conformably to the affidavit. The commission and extent *pro forma*, and the inquisitions thereon, are then laid before the sheriff's jury, together with the affidavit; and on that affidavit alone they find the inquisitions, as previously engrossed. The affidavit is then taken, with the commission and extent *pro forma*, and the inquisitions thereon, to a baron of the court, or the chancellor of the Exchequer; and he indorses his initials on the commission, which is the warrant for its issuing,^a and signs his *fiat* for the extent in aid, at the foot of the affidavit, at *the same time.* If the crown debtor be a debtor [*1111] by judgment, recognizance or bond, then of course no commission issues; but the affidavit and extent *pro forma*, and the inquisition thereon merely, are laid before the jury; on which affidavit, as the only evidence, the jury find the facts already stated in the inquisition. For the extent in *aid* there is commonly but one *fiat*; it not being usual to grant a *fiat* for the extent *pro forma*, though that is sometimes done.⁷

The form of the extent in *aid* is precisely the same as that of an extent in chief in the *second* degree;^a and under it, the body of the defendant may in strictness be taken in execution, and his lands and tenements, goods and chattels, &c. as under the latter extent.^a The *capias* clause however, of the writ of extent in aid, is not usually enforced: And where there had been effects seized sufficient to satisfy the debt, the court seemed disposed to order the discharge of a defendant taken under it, on his giving security for his appearance at the return of the writ.^b

Before the making of the statute 57 Geo. III. c. 117. it had become the practice in many cases, to issue extents in *aid*, for the levying and recovering of larger sums of money than were due to his majesty, by the debtors in whose behalf such extents were issued:^c and the court of Exchequer having refused to set aside an extent in aid, on the ground that the debt levied under it was of greater amount than the debt sworn to be due from the original debtor of the crown, although the party moved it on the condition of paying the crown's debt;^d it was enacted, by the above statute,^e that "upon the issuing every extent in aid, on behalf of any debtor to his majesty, his majesty's court of Exchequer at *Westminster*, or the chancellor of his majesty's Exchequer, or lord chief baron or other baron of the said court, granting the *fiat* for the issuing of such extent in aid, shall cause the amount of the debt or sum of money due or claimed to be due to his majesty, to be stated and specified in the said *fiat*; and that in all cases in which the debt or

^a 3 Price, 278. *Ante*, 1093. In this case a writ of *scire facias* was set aside, for want of an indorsement by a baron, of the warrant on the commission.

^x West, 288, 9. *Id. ibid.*

^y *Id.* 292. Append. Chap. XLII. § 20. West, Append. 27, 29.

^z *Id. ibid. Ante*, 1095, &c.

^b 3 Price, 94.

^c See the preamble to the statute. *Ante*,

379. (a.)

^d 1 Price, 894. West, 273. and see 8 Ves. 241. where the Chancellor decided, that there was no equity for a person against whom an extent in *aid* had issued, to be reimbursed by his creditor, on the ground that he had property sufficient to satisfy his debt to the crown, without having recourse to the extent in aid.

^e § 1, 2.

debts found due to the debtor to his majesty shall be equal to or exceed the debt stated and specified in the said *fiat* as aforesaid, the [*1112] *amount of the debt *so stated and specified in the said fiat* shall be endorsed upon the writ; and the writ so endorsed shall be deemed to be, and be the authority and direction to the sheriff or other officer who shall execute such writ, in making his levy and executing the same, as to the amount to be levied and taken under the said writ: and that in all cases in which the debt or debts found due to the debtor to his majesty, shall be of less amount than the debt stated and specified in the said *fiat* as aforesaid, *the amount of such debt or debts found due to such debtor to his majesty* shall be endorsed upon the writ; and the writ so endorsed shall be deemed to be, and be the authority and direction to the sheriff or other officer who shall execute the said writ, in making his levy and executing the same, as to the amount to be levied and taken under the said writ: and that the money levied, taken, recovered, or received under or by virtue of every such extent in aid so prosecuted and issued, shall be, by order of the said court, paid over to and for his majesty's use, towards satisfaction of the debt so due to his majesty as aforesaid. Provided always, that in every case in which the sum produced by the sale of any lands, goods or chattels taken, or by the receipt of any sum of money, by any sheriff or other officer, under any such writ of extent, for the purpose of levying the amount or sum of money endorsed upon the back of the writ, shall be more than sufficient to satisfy the amount of the sum so endorsed upon the writ, such overplus shall be paid into the court of Exchequer, together with the said amount endorsed upon the said writ; and the said court shall, upon any summary application or applications, make such order, for the return, disposal, or distribution of any such surplus, or any part or proportion thereof, as to the said court shall appear to be proper." There is also a *proviso* in the statute,^f that it shall not prejudice the debtor to the crown, in recovering the remainder of his debt.

And, by another clause of the same statute,^g "it shall and may be lawful for any person or persons, imprisoned under or by virtue of any writ of *capias*, on any extent or extents in aid, to apply to the barons of his majesty's court of Exchequer in *England* or *Scotland*, or to any baron of the same court in vacation, for his, her, or their discharge, giving one month's previous notice in writing, to the person or persons to whom he, she or they owed the debt or sum or sums of money for which he, she, or they is or are so imprisoned, [*1113] at the time such debt was seized *under such extent in aid, of his, her, or their intention to make such application; and stating in such notice the ground of such application, and an enumeration and description of all and every the property, debts and effects whatsoever, of such person or persons, in his, her, or their own possession or power, or in the possession or power of any other person or persons, for his, her, or their use; and the said court, or any such baron in vacation, to whom such application shall be made,

is authorized to order such person or persons to be brought before them or him, to be examined upon oath, touching and concerning his, her, or their property and effects; and if such person or persons respectively shall, upon such examination, make a full disclosure of all his, her, or their property and effects, to the satisfaction of the said court or baron, or it shall otherwise appear reasonable and proper to such court or baron, that such person or persons should be no longer imprisoned under such writ, such court or baron may order a writ of *supersedeas quoad corpus* to be issued out of the said court, for the liberation of such person or persons from such imprisonment. Provided always, that no such liberation as aforesaid shall be held or deemed to satisfy or supersede such extent in aid, or any proceedings thereon, except as to such imprisonment as aforesaid, or the debt or debts seized under and by virtue thereof, and for which such person or persons shall be so imprisoned."

There is a clause in the last general insolvent act,^b that "it shall not extend to discharge any prisoner seeking the benefit of that act, with respect to any debt due to his majesty, or to any debt or penalty with which he shall stand charged at the suit of the crown, or of any person, for any offence committed against any act or acts of parliament relative to his majesty's revenues of customs, excise, salt or stamp duties, or any branches of the public revenue, or at the suit of any sheriff or other public officer, upon any bail bond entered into for the appearance of any person prosecuted for any such offence, unless three of the lords commissioners of his majesty's treasury for the time being shall certify under their hands, their consent to such discharge." And, by another clause of the same statute,ⁱ "any person or persons, imprisoned under or by virtue of any writ of *capias*, in any *immediate* extent or extents, issued and remaining in force, at the instance or for the benefit and reimbursement of any surety or sureties, or other person or persons, or the inhabitants of any parish, ward or place, who shall or may have advanced and paid the debt to the crown, and by [*1114] reason whereof the lords commissioners of his majesty's treasury may not be authorized to give their consent last aforesaid, may apply to the barons of his majesty's court of Exchequer in *England* or *Scotland*, for his, her or their discharge, giving one month's previous notice in writing of the intended application, to the surety or sureties, or person or persons aforesaid, or to the churchwardens or overseers of the parish, ward or place, at whose instance, or for whose benefit respectively such extent or extents shall remain in force;" and may proceed thereon, for obtaining his, her or their discharge, in like manner as is directed by the statute 57 Geo. III. c. 117. § 6. with respect to persons imprisoned under extents in aid.

Another mode of the subject's taking advantage of the crown process, for the recovery of his private debts, was by assigning

^b 1 Geo. IV. c. 119. § 40.

ⁱ § 41. And for the course of proceeding, on the part of an insolvent debtor of the crown, imprisoned under an extent, for the purpose of obtaining his discharge under that statute, see 9 Price, 142.

them to the king, for debts due to him.^{*} This was allowed at common law; and might have been done, even though the amount of the debts assigned were not ascertained:¹ and after such assignment, the king was entitled to have execution against the body, lands and goods of the debtor.^m But this prerogative of the king having been abused by his debtors, for their own private benefit, a rule of court was made, that "no debt shall be assigned and set over to the king, by any person or persons, but such as shall be allowed of, and appointed to be retained, by the lord high treasurer of *England*, chancellor, and barons of the Exchequer, in open court."ⁿ And, by the statute 7 *Jac.* I. c. 15. "no debt shall be assigned to the king, his heirs, and successors, by or from any debtor or accountant to his majesty, his heirs or successors, other than such debts as did before grow due originally to the king's debtor or accountant, *bonâ fide*; and that all grants and assignments of debts to the king, his heirs or successors, which shall be had or made contrary to the true intent of that act, shall be void and of no force." A privy seal was also made, in the 12th of *James* the First, declaring that "no debt of record, or other debt or covenant whatsoever, should at any time be assigned, granted or conveyed to him, his heirs or successors, by any debtor or accountant, or other person or persons whatsoever: nor any such assignment allowed, admitted or accepted." This privy seal having determined on the death of [*1115] *James* the First, a rule of court was made in the *succeeding reign,^p for enforcing the execution of the statute; which directs, that "he who assigneth any debt to the king, shall take an oath, that the debts assigned are just and true debts, and have not formerly been put in suit in any other court; and that the same are his own proper debts, originally due unto him *bonâ fide*, without any trust; and that he hath not received the same, nor any part thereof, except, &c."^q But a debt due to a man *jure uxoris*, is considered as a debt originally due to him, within the meaning of the statute.^r It is also a rule, that "no debts without specialty shall be assigned to the king; otherwise in case of debts in aid:" Since which latter rule, assignments of debts to the king have become obsolete.^t

Having thus far treated of writs of extent, *in chief* and *in aid*, separately, I shall, in what follows, consider them together, and show first, the proceedings under them, to enforce payment of the debt due to the crown or its debtor; and secondly, the means of resisting such proceedings, either by the defendant or a third person.

^{*} 2 Leon. 67.

¹ *Id.* 55. and see Gilb. Excheq. 167, &c. Com. Dig. tit. *Assignment*, D.

^m 4 Inst. 115. and see Com. Dig. tit. *Debt*, 15.

ⁿ R. M. 54 & 35 Eliz. in *Scac.* West, Append. 124. Man. L. Ex. Append. 228.

^o West, 258, &c.

^p R. H. 15 Car. I. in *Scac.* Gilb. Exch.

173, 4, 5. West, Append. 124, 5. Man. L. Ex. Append. 229.

^q *Id.* *ibid.*

^r Parker, 271.

^s R. H. 15 Car. I. in *Scac.* Gilb. Exch. 176, 7. and see West, Append. 125. Man. L. Ex. Append. 230. where the word *otherwise* is omitted.

^t West, 255.

On the return day of the writ of extent, in *chief* or in *aid*, or as soon after as the writ is actually returned, a rule or order is entered on the back of it, by the prosecutor's clerk in court, that "if no one shall appear and claim the property of the goods, &c. mentioned in the inquisition, on or before that day se'nnight, a writ of *venditioni exponas* shall issue, to sell the same:"^a and where there are not *six* days remaining in term, without reckoning *Sunday*, the rule must be given for the *seal* day after term,^b being a day appointed on the last day of each term, at the discretion of the court.^c If no one appear and claim the property, within the time limited by the rule, a *venditioni exponas* issues, to sell the goods seized under the extent. It was formerly holden, that this writ should not issue without motion in court:^d but now it is otherwise:^e though the defendant is entitled, independently of the rule, to notice of an intended sale.^f The *venditioni exponas* commands the sheriff to sell the goods for the best price he can, and at least for the price at which they were *appraised, and to have the proceeds of the sale before the [*1116] barons, to be paid to them for the use of the crown. If the sheriff cannot sell the goods for the appraised price, he should return that fact; and then a *venditioni exponas* issues, directing him to sell for the best price, without reference to the appraisement:^g And, by the practice of the Exchequer, the sheriff, selling under a *venditioni exponas*, is not entitled to make a reduction in his return, either for poundage or *extra* expenses; but should return the whole sum produced by the sale, upon which the court will order it to be paid over, deducting poundage; and he must move the court for any *extra* allowance, to which he may be entitled.^h

The ordinary mode of proceeding for the recovery of *debts* found to be due to the king's debtor, is by *scire facias*;ⁱ or, on an affidavit of danger, and the *fiat* of the chancellor or one of the barons of the Exchequer, by an *immediate* extent in the *second* degree:^j And where the debts are small, the court may order a receiver to collect them, and pay them to the deputy remembrancer.^k

If the produce of the goods sold under the extent be not sufficient to pay the debt, the court will make an order for sale of the debtor's *lands*, under the statute 25 Geo. III. c. 35. Before the making of this statute, the crown it seems could not have sold the lands of its debtor; but the mode of levying the debt was by *levari facias*, under which the sheriff levied the rents and growing profits of the lands, until it was satisfied.^l But now, by the above statute,^m "the court of Exchequer is authorized, on the application of his majesty's attorney general in a summary way, by motion of the same court, to order that the right, title, estate, and interest of any debtor to his majesty,

^a *Id.* 174. Man. L. Ex. 553. and see Gilb. Excheq. 170.

^b Man. L. Ex. 553.

^c *Id.* (t.) and see 2 Fowl. 4. 142. West, 175.

^d Bunb. 45.

^e West, 219.

^f 2 Price, 155.

^g West, 220.

^h 1 Price, 205. 4 Price, 131. and see Vol. II.—44

West, 220. Man. L. Ex. 554. Post, 1119.

ⁱ *Ante*, 1104. And for the proceedings in *scire facias*, for debts due to the crown, see the next chapter.

^j Bunb. 24. 127. 134.

^k *Id.* 293.

^l Gilb. Excheq. 170. and see West, 220, 21.

^m § 1.

his heirs and successors, and the right, title, estate and interest of the heirs and assigns of such debtor, in any lands, tenements or hereditaments, which have been, or shall thereafter be extended, under and by virtue of any such writ of extent or *diem clausit extremum* as therein mentioned, or so much thereof as shall be sufficient to satisfy the debt for which the same shall have been so extended, shall be sold, in such manner as the said court shall direct: And when a purchaser or purchasers shall be found, the conveyance of the lands, tenements or hereditaments, so decreed to be sold, shall [*1117] be made to the purchaser or purchasers, by *his majesty's remembrancer in the said court of Exchequer, or his deputy, under the direction of the said court, by a deed of bargain and sale, to be enrolled in the same court: And from and after the making of such conveyance, and the inrolment thereof as aforesaid, the bargainee or bargainees in such conveyance, and his or their heirs, executors, administrators, and assigns, shall have, hold, and enjoy the lands, tenements and hereditaments therein comprised, for his and their own respective use and benefit, not only against the extent of the crown, but also against such debtor of the crown, or the surety or sureties for such debtor, and all persons claiming under such debtor, or the surety or sureties, unless by a title paramount to, and available in law against such extent as aforesaid: And all monies which shall become payable from any such purchaser or purchasers as aforesaid, shall be paid, accounted for, and applied towards discharge of the debt due to the crown, and of all costs and expenses which shall be incurred by the crown in enforcing the payment of such debt, in such manner as the said court of Exchequer shall from time to time order and appoint: And if, after payment of the whole debt to the crown, and of all costs and expenses incurred in enforcing the payment thereof, there shall be any surplus of the monies arising from any such sale, the said surplus shall belong to the same person or persons as would be entitled to the lands, tenements or hereditaments sold, if there had not been a sale thereof, and shall accordingly be paid to such person or persons, under the order and direction of the said court of Exchequer, upon motion or petition to the said court, to be made upon such notice to the crown, and to be supported by such affidavits or other proofs, as to the said court shall from time to time seem just and reasonable." On this statute an application may be made to the court, by the attorney general, for sale of the lands; but no order will be made on such application, where it appears that goods have been seized under the extent, sufficient to pay the debt.¹ And where the crown debtor is entitled to an equity of redemption, the prosecutor must give the mortgagee notice of his intended application, for an order to sell the estate, subject to the mortgage. Under this order, the sheriff ought to sell the equity of redemption only.¹ And where he had sold the whole estate, without reference to the mortgage, the court refused to order payment of the mortgage out [*1118] of the purchase money, without the consent of the *mort-

¹ 3 Price, 40. West, 187. 225, S. C. Man. L. Ex. 555, 6. *Arle*, 1089, 90.

¹ 1 Price, 207. 2 Price, 67. and see West, 225, 6. Man. L. Ex. 556, 7.

gager; but directed a reference to the deputy remembrancer, to ascertain what was due on the mortgage.^m It is also sometimes referred to this officer, to enquire into a claim of dower,ⁿ and to take an account of the sum due to the crown, for principal and interest, &c.

The sheriff's right to *poundage*, on an extent, principally depends on the statute 3 Geo. I. c. 15. previous to which the sheriff, it is said,^o was not entitled to any fee for executing an extent: but now, by that statute,^p "all sheriffs, who shall levy any debts, duties, or sums of money, except *post* fines due to the king's majesty, his heirs or successors, by process to them directed upon the summons of the pipe or green wax, or by *levari facias* out of the court of Exchequer, shall from time to time, for their care, pains and charges, and for their encouragement therein, have an allowance upon their accounts of *twelve* pence out of every *twenty* shillings, for any sum not exceeding *one hundred* pounds, so by them levied or collected, and the sum of *six* pence only for every *twenty* shillings, over and above the first *one hundred* pounds; and for all debts, &c. except *post* fines due to his majesty, his heirs and successors, by process on *fieri facias* and *extent*, issuing out of any of the offices of the court of Exchequer, the sum of *one shilling and six pence* out of every *twenty* shillings, for any sum not exceeding *one hundred* pounds, so by them levied or collected, and the sum of *twelve* pence only for every *twenty* shillings, over and above the first *one hundred* pounds: Provided always, such sheriff shall duly answer the same upon his account, by the general sealing day of such term in which he ought to be dismissed the court, or in such time to which he shall have a day granted to finish his said accounts, by warrant signed by the lord chief baron, or one of the barons of the coif of the said court for the time being, and not otherwise." On this statute, the sheriff is entitled to his poundage, on a levy made under an extent in *aid*,^q whether the debt be paid to him, or to the prosecutor of the extent:^r And if the sheriff seize under an extent, and before a *venditioni exponas* the debt be paid to him, and he pay it over to the prosecutor of the extent, his poundage shall be allowed him.^s But "sheriffs are not entitled to poundage, on *money* seized in [*1119] the crown debtor's possession, under an extent against him, nor on money paid by the sureties of a crown debtor, who has been arrested on the crown process, in order to obtain the release of his person.^t And though the whole debt be paid to the prosecutor, it seems that the sheriff shall have poundage only on the amount levied:^u And where the sheriff, besides his poundage, charged *five per cent.* for an auctioneer to sell malt, the charge was disallowed.^v If the sheriff,

^m 1 Price, 207. 2 Price, 67. and see West, 225, 6. Man. L. Ex. 556, 7.

ⁿ 2 Price, 71. and see Man. L. Ex. 557.

^o West, 231. Man. L. Ex. 557. Chit. Prerog. 312. But see *Jones's* Index to the Exchequer Records, tit. *Sheriff*, by which it seems, that before the statute 3 Geo. I. the sheriff was entitled to poundage on an extent.

^p § 3. and see 1 Chit. Rep. 295. 6 Moore, 338. 3 Brod. & Bing. 143. 8. C.

^q Parker, 177.

^r 3 Anstr. 718. *in notis*.

^s Parker, 177. and see 5 Durnf. & East, 470.

^t 8 Price, 587. *Ante*, 1084, 5. 1103.

^u West, 239.

^v 2 Anstr. 412.

however, has been put to any extraordinary trouble in keeping possession of the defendant's goods, &c. he may apply to the court for a rule to shew cause, why it should not be referred to the deputy remembrancer, to ascertain whether any and what allowance should be made him by the prosecutor of the extent, beyond the poundage.⁷ But he is not entitled, on the rule being made absolute, to the costs of the application, or of the reference.⁷

By the above statute it is declared, that "no sheriff, &c. shall take, ask or receive, any fee, gratuity or reward, of the person or persons liable to pay any debts, duties or sums of money, to his majesty, or of any other person, for or upon pretence of levying or collecting the same, except the sum of *four* pence only for an acquittance, upon pain of being deemed guilty of extortion, and forfeiting for every such offence, treble damages and costs to the party aggrieved, and double the sum so extorted; to be ordered, decreed and given by the barons of the Exchequer, upon complaint and proof of such extortion, in such short and summary way and method, as to them shall seem meet; provided the conviction be had and made within *two* years after the offence committed."² The sheriff therefore is entitled to poundage, in the cases mentioned in the above statute, not from the defendant, but from the crown, or prosecutor of the extent; and he is not to levy poundage under it, in addition to the debt, unless it be secured by a penalty; but must levy the amount of the debt merely, and is to have his poundage out of the debt so levied; the words of the statute being, "out of the sum levied;" and therefore, if poundage be levied in such case by the sheriff,^a or received by the prosecutor of the extent or his attorney under a compromise, in order to stay proceedings,^b the court will order it to be refunded. But where the debt is secured by a penalty, there poundage may be levied in addition to the debt, so that the [*1120] levy do *not exceed the penalty.^c And whenever the crown is entitled to levy its costs and charges, and is bound by the statute 3 Geo. I. to allow the sheriff poundage, in such case poundage may be levied by the crown, as an *item* of such costs and charges.^d When two extents issue into different counties for the same debt, and both sheriffs seize goods, and the debt is paid to one of the sheriffs before a *venditioni exponas* to either, that sheriff to whom the money is paid shall have full poundage.^e But in such case, when the debt is paid to the officers of the crown immediately, the poundage shall be apportioned between the sheriffs.^f

Having thus shewn the different modes of proceeding for the recovery of debts, at the instance and for the benefit of the crown or its

⁷ 4 Price, 131. and see 1 Price, 205. 717. Wightw. 117.
Ante, 1116.

^a § 1. ^{*} 1 Price, 448.

^b 5 Price, 189.

^c 2 Anstr. 369.

^d 3 Price, 280. West, 230. 236. S. C.

^e 1 Anstr. 279. 2 Anstr. 358. 3 Anstr. West, 231, &c. Man. L. Ex. 557, &c.

^f 3 Anstr. 718. *in notis*. And see further, as to the apportionment of poundage between the preceding and subsequent sheriff, stat. 3 Geo. I. c. 15. § 9. and as to the poundage in general on extents, see

debtor, it will next be proper to state the means of resisting such proceedings, either by the defendant or a third person. These means are first, by *motion*, or application to the court, to set aside the extent, and proceedings under it; secondly, by *petition* of right; thirdly, by *monstrans de droit*; fourthly, by *traverse* of office; and fifthly, by *demurrer*.

Motions to set aside extents are of two kinds: first, on account of some defect apparent on the face of the proceedings; and secondly, on the ground of some objection which does not appear thereon, but must be verified by affidavit.⁵ If the proceedings on record are bad on the face of them, the defendant, though he might demur, may also move to set them aside;⁶ as if the extent be founded on a debt which appears on the face of the proceedings not to have been due at the time of the caption of the inquisition,¹ or the inquisition itself is argumentative, so that no certain traverse can be taken thereon,² or the property found is not by law extendible,¹ &c.: And it is of course generally advisable to move in the first instance, instead of demurring; because, if the motion be decided against the claimant, he may still plead; whereas if, after argument on demurrer, the point should be decided against him, the judgment is usually final.³

*When a motion is made to set aside an extent, for some [*1121] matter not apparent on the face of the proceedings, such matter must be verified by affidavit.⁴ And if any party besides the defendant himself move to set aside the proceedings, such party must in his affidavit shew his title to the property seized.⁵ If the prosecutor's affidavit be defective in the statement of the defendant's insolvency, the defendant may move to set it aside;⁶ and he has no other remedy in this case, as the affidavit constitutes no part of the record, and is therefore not open to a traverse or demurrer.⁷ But where the affidavit is clear and express, no counter affidavits can be produced, for the purpose of explanation or contradiction.⁸ So, if a party procure himself to become a debtor to the crown, for the purpose of suing out an extent in aid,⁹ or it be sued out in breach of good faith,¹⁰ the extent may be set aside on motion: And where an extent has been taken out, under circumstances in which the practice of the court does not authorize the issuing of prerogative process, the objection must be made by motion; for if pleaded and put in issue, the court will not permit the question to be tried.¹ But if two writs are issued, one for a joint debt and the other for a separate debt, in the same sum, on inquisitions finding a joint debt and a separate debt in different sums, the court will not set them both aside, on the ground of the irregularity of one of them, though confessedly a mistake; but they will support that which can be shewn to be cor-

⁵ West, 180.

⁶ *Id.* 181.

¹ *Rex v. Heath*, Hughes, 174.

² 3 Price, 269.

³ Hardr. 226. and see West, 181. Man.

L. Ex. 604, 5.

⁴ West, 182.

⁵ West, 182. and see 7 Price, 636.

⁶ *Id.* 183.

⁷ 3 Price, 38. West, 53. 180. West, Append. 51. S. C.

⁸ *Rex v. Lawton*, M. 57 Geo. III. West, 180.

⁹ *Rex v. Huntley*, M. 1687. *Id.* 295, 6, 7. but see Bunb. 127.

¹⁰ West, 297.

¹ 4 Price, 11.

rect:^a And where a joint debt has been found, the death of one of the debtors, in the interval between the *fiat* and extent, does not vitiate the proceedings.^a

The party grieved by the extent may move to set it aside, before he enters his appearance and claim:^b but the motion for that purpose should regularly be made before he has obtained time to plead:^c and the writ ought to be brought into court by the officer, before the motion is made, when any objection is taken which arises upon the face of the extent.^a This motion may be made either in term time, on any day except *Monday* or *Thursday*, or at the sittings after term, (now usually holden in *Gray's Inn Hall*,) which are always appointed by the court on the last day of every term except *Easter* term, when, on account of the shortness of the vacation, [*1122] *Thursday* next after the *last day of that term is always fixed as a day for motions only.^b In term time, motions in revenue matters are commonly heard on *Fridays* and *Saturdays*.^c It is usual to give *two* days previous notice of motion, to set aside an extent;^d but this is not necessary, when the party moves for a rule to the cause merely;^e and when the necessity for applying to the court is urgent, and the term is drawing to a close, the court will sometimes direct that short notice for the next day be accepted.^f

Besides the motions to set aside the extent, there are others which are sometimes necessary to be made by the defendant or claimant; as to pay the debt for which the extent issued; or that the sheriff, who has levied money, shall pay the debt out of it, into the receipt of the Exchequer, and that on such payment an *amoveas manus* do issue,^g &c. This may, it seems, be done at any time during the pendency of the extent.^h And when goods of the debtor have been seized under an extent, to an amount, according to the appraisement, beyond what is sufficient to satisfy the debt due to the crown, the court on motion will grant an *amoveas manus*, on the defendant's paying into court, or the receipt of the Exchequer, the debt without the costs.^h So, when the sheriff has collected debts under the extent, which is often done, (though the sheriff, as before observed,ⁱ has no authority by the writ to do so,) it is sometimes moved, that he shall pay such sums into the hands of the deputy remembrancer, to be laid out *pendente lite* in the funds, or in Exchequer bills, or in such way as the court shall direct.^k

By the common law, whenever the king was in possession by virtue of an inquisition, the subject was put to his *petition* of right, unless the right of the party appeared in the inquisition, and then at the common law he might have had a *monstrans de droit*: but when the inquisition only entitled the king, and he was obliged to bring a *scire facias* against the party to recover possession, there at

^a 1 Price, 395.

^b *Id. ibid.*

^c 3 Price, 280.

^d *Id.* 38. and see West, 184. Man. L. Ex. 606.

^e 1 Price, 395.

^f 1 Fowl. 284.

^g Man. L. Ex. 610.

^h West, 179.

ⁱ *Rex v. Collingridge, id. ibid.* and see Man. L. Ex. 610.

^j 1 Price, 117. and see Parker, 89.

^k West, 187. and see 7 Price, 636.

^l 3 Price, 40.

^m *Ante*, 1103.

ⁿ 1 Price, 299. and see West, 186, 7.

common law the party might have *traversed* the king's title; for in that case, the king being in nature of a plaintiff, the party in possession might by pleading have put him to prove the title upon which he would recover. But when the king was in possession by virtue of the inquisition, there the party who would get that possession from him was in nature of a *plaintiff*, and therefore had no method of proceeding but by way of petition; for no action could lie against the king, because *no writ could issue, as he [*1123] could not command himself. This remedy by petition, however, being attended with great delay and charge to the party grieved, the statutes of 34 Edw. III. c. 14. 36 Edw. III. c. 13.¹ and 2 and 3 Edw. VI. c. 8. were made, to enable the subject to traverse inquisitions, or otherwise to shew their right. Thus were traverses and *monstrans de droit* introduced, in lieu of petitions;² the only difference between them being, that in a traverse, the title set up by the party is inconsistent with the king's title found by the inquisition, which he therefore must traverse; in a *monstrans de droit*, he confesses and avoids the king's title. But in both cases he must make a title in himself; and if he cannot prove his title to be true, although he be able to prove that the king's title is not good, it will not serve him.³ In traverses at common law, however, the party is in nature of a *defendant*, and therefore need not set up any title in himself.⁴

The method of proceeding at common law by *petition* was, that the king's title being found by inquisition, the party petitioned to have an inquest of office, to inquire into his title: If his title was found by such office, then he came into court, and traversed the king's title: So that the record began by setting out the first inquisition found for the king, and after that, the return of the inquisition taken upon the petition, and then went on with "*Et modo ad hunc diem venit*," and so traversed the king's title. In conformity to these proceedings at common law, the traverse and *monstrans de droit* given by the statutes, begin by stating the inquisition, and then go on, "*Et modo ad hunc diem venit*," &c.⁵ And from this manner of pleading, some have considered the party traversing as *defendant*;⁶ but when it is considered, that this traverse comes in lieu of the petition at common law, and that it does not suspend the vesting in the king by the inquisition, and that the judgment for the party is an *amoveas manus*, and the judgment against him a *nil capiat*, it seems clear he ought to be deemed a *plaintiff*, and as such is capable of being nonsuited.⁷

*The first step to be taken on a traverse, by the party [*1124]

¹ By this statute, if an office taken for the king be false, the party aggrieved thereby may in all cases traverse the fact found, though the act speaks of offices taken before *escheators* only. 4 Co. 58. a. Finch L. 323, &c. Man. L. Ex. 582.

² 3 Hen. VII. 3.

³ Staundf. *Prærog.* c. 20. p. 65. 2 Salk. 448.

⁴ 2 Salk. 447. 6 Mod. 32. S. C.

⁵ The only difference between the pleading in a traverse and *monstrans de droit* is that in the one, the party *pro placito dicit*, in the other, *pro placito et monstratione juris dicit*.

⁶ 2 Str. 1208.

⁷ 2 Salk. 448. 4 Hen. VI. 12. and see *Bul. N. Pr.* 215, 16. 3 Blac. Com. 256. Man. L. Ex. 578. 580. 582, 3. 2 Madd. Chan. 722. 786. 733, &c.

grieved, is to enter his appearance and claim of property on the back of the writ, if possible, within the time limited by the rule to appear and claim.^a The appearance is entered either by the defendant or claimant in person, or in the name of one of the sworn clerks of the king's remembrancer's office, in which the return is filed:^c The claim is made in the court into which the inquisition is returned; and though a common law proceeding, the traverse is taken in the remembrancer's office, on the equity side of the Exchequer,^d from which extents commonly issue.^e In cases of bankruptcy, it is usual and advisable to enter a claim in the name of the bankrupt, as well as in the names of the assignees:^f And where the assignment of a bankrupt's estate was not made until after the expiration of the rule to appear and claim, the court allowed a claim to be entered, upon a motion made in the following term.^g So, where the claim was omitted to be entered by the mistake of the clerk in court,^h and in other cases, when the delay is satisfactorily accounted for by affidavit, the court will grant relief.ⁱ But where a defendant on an extent had moved to quash it, on facts stated by affidavits, which were satisfactorily answered, whereupon a *venditioni exponas* issued, the court would not afterwards permit him to enter a claim, and traverse the inquisition.^j

If an appearance and claim be entered, within the time limited by the rule, a rule to plead is given, under the entry of the appearance and claim,^k on the back of the writ. This is a *four day* rule; on the expiration of which the defendant or claimant may obtain further time, upon a motion of course, requiring, in the first instance only counsel's hand.^l

Pleas to extents are either by the *defendant*, or party against whom the extent issued, or by *third* persons; and they are of two kinds: first, pleas which go in denial or discharge of the *debt*, and which can be pleaded only by the defendant, or those claiming under him; and secondly, pleas which do not go to the discharge or denial of the debt, but are pleaded to the *extent* by third persons, who claim the goods, &c. which have been seized as the defendant's, and which pleas go to the property of the goods, &c. seized under the [*1125] extent.^m *The common pleas by the defendant to an extent, in *chief* or in *aid*, are *non est factum*, or performance,ⁿ if the debt be founded on a bond; or if it be claimed on a simple contract, *non indebitatus*, or that the defendant is not indebted to the crown or its debtor, as alleged in the inquisition: Under this latter plea, the defendant may give in evidence any matter in denial or discharge of the debt, in like manner as under the plea of *nil debit*, in an action of *debt* on simple contract:^o And on an extent in *aid*, the

^a Man. L. Ex. 585.

^c *Id. ibid.*

^e 2 Str. 749. *Ante*, 1094.

^f Man. L. Ex. 590.

^g *Id.* 589.

^h 5 Price, 39. Man. L. Ex. 589. S. C.

ⁱ 3 Price, 38. *n. Rex v. Aspinall*, West, 178. and see 5 Price, 576.

^j Man. L. Ex. 589, 90. and see 8 Price,

668.

^k 4 Price, 323. and see 7 Price, 633.

636.

^l Man. L. Ex. 589.

^m *Id.* 590. West, 193.

ⁿ West, 193.

^o Trem. P. C. 584. 608.

^p *Ante*, 700. and see West, 199, 200.

Man. L. Ex. 592, 3.

defendant may negative the debt to the crown, as well as that which is found to be due to the king's debtor.¹ But it is sufficient, in an inquisition on an extent in *aid*, that the prosecutor of the extent be found to be indebted to the crown generally, at the time of taking the inquisition, without stating the amount of the debt, or the time and manner of its accrual.² Also, by the statute 33 Hen. VIII. c. 39. § 79. "if any person, of whom any debt or duty is demanded or required, shall allege, plead, declare, or shew good perfect and sufficient cause and matter in law, reason or good conscience, in bar or discharge of the said debt or duty, or why such person ought not to be charged or chargeable with the same, and the same cause or matter so alleged, &c. be sufficiently proved, that then the court shall have full power and authority to accept adjudge and allow the same proof, and wholly and clearly to acquit and discharge the person so impleaded, &c." From this clause, the statute 33 Hen. VIII. is frequently called in the books, the statute of *equity*.³ And, under this statute, matter in equity may be pleaded to the inquisition,⁴ or brought before the court by motion,⁵ or bill in equity.⁶

On an extent in *chief*, the defendant cannot plead a set off;⁷ nor the statute of limitations, or bankruptcy; nor, on a bond, payment *after* the day mentioned in the condition;⁸ nor any other plea given by statute, in which the crown is not named.⁹ But, on an extent in *aid*, the defendant may plead any matter which would be a good defence against his creditor; as a set off of money due from the crown debtor to himself,¹⁰ or, as it seems, the statute of limitations,¹¹ or bankruptcy.¹²

*In pleas by a *third* person, it is not sufficient for the [*1126] party pleading to traverse the title of the crown merely, that is, to say that the crown debtor was not possessed or seized, at the time when, &c. in manner and form as in the inquisition is alleged; but he must also set out a title in himself:¹³ And when the assignees of a bankrupt claim goods seized under an extent against the bankrupt, upon the ground that the assignment was prior to the *teste* of the extent, if they stile themselves assignees, they must set out all the proceedings under the bankruptcy: but it is not necessary for them to call themselves assignees at all; it being sufficient for them to say that they were possessed of the goods at the time of the *teste* of the extent, for the property of the goods draws to it the possession in law.¹⁴ But it is nevertheless usually advisable for the assignees in such case to claim as assignees, and to set out their whole title through the bankruptcy; for if they were merely to state themselves to be possessed of the goods, &c. traversing the defendant's possession,

¹ Man. L. Ex. 593.

² 5 Price, 614.

³ West, 201.

⁴ 7 Co. 19. Hardr. 176. 502. West, 201, &c.

⁵ 1 Price, 96.

⁶ 7 Co. 20. Lane, 51. and see 1 Price, 216. West, 209. Man. L. Ex. 592.

⁷ Hughes, 204.

⁸ 1 Price, 23.

⁹ West, 199. and see 3 Price, 269. Man. L. Ex. 592.

¹⁰ Hughes, 204. West, 248, 9. and see 3 Price, 269. 4 Price, 50. Man. L. Ex. 593, 4.

¹¹ 6 Price, 24.

¹² West, 249.

¹³ Staundf. *Prærog.* 63. a. West, 210. Man. L. Ex. 590, 91.

¹⁴ 2 Wms. Saund. 47. k.

and the crown were to take issue, as it most probably would in that case, upon the assignees' possession, they must prove their whole title through the bankruptcy; whereas, if they set out their title through the bankruptcy, it is not probable that the crown would traverse all parts of their title.² The defendant, or party claiming the goods, &c. can plead but *one* plea to the whole inquisition; the statute 4 Ann. c. 16. § 7. which gives the liberty of pleading several matters, being holden not to extend to the crown.³ But he may plead several pleas to distinct parts of the inquisition; or traverse as to part, and demur to the residue.⁴

When the inquisition finds a bad title for the crown, the claimant may *demur* in law upon the record, without traversing;⁵ or he may move the court on that ground to set it aside.⁶

The defendant, or party pleading to an extent, cannot rule the crown to reply.⁷ But when the attorney general will not reply or demur in a reasonable time, the court will order judgment to be entered for the defendant, as if the plea were confessed, unless the attorney general, upon being attended, will either enter a *nolle prosequi*, or proceed in the cause.⁸ The defendant, however, should first apply to the attorney general to proceed; and if he will not do [*1127] so, the court may give judgment, as if he had confessed the plea.⁹ Upon extents in *aid*, the practice is to move for judgment, if the crown do not reply before the end the *third* entire term after plea filed.¹⁰ If the attorney general proceed, he either replies or demurs to the plea; and when the king is in the situation of a defendant, he may reply in abatement or in bar;¹¹ or in abatement as to part, and in bar as to the residue.¹² A replication in bar is *general* or *special*; the former denying one or more of the allegations in the plea, the latter confessing and avoiding them, or concluding the defendant by matter of estoppel.¹³ And, in replying to the plea, the attorney general may either traverse the title of the party pleading, or maintain the inquisition, at his election.¹⁴ The replication must not be inconsistent in any material point, with the extent,¹⁵ or inquisition,¹⁶ which it is its office to support; as such a replication would be a departure.¹⁷ But if the plea allege several facts, the king by his prerogative may traverse them all, though a common person ought to traverse but one;¹⁸ or he may confess and avoid, and traverse also.¹⁹ And if the king have several titles traversed, he may maintain all or only one of them at his election.²⁰ The replication, whether general or special, should be signed by the attorney general, all the proceed-

² West, 211. Man. L. Ex. 597, 8.

³ *Ante*, 707. West, 210, 11, 12. Man. L. Ex. 598.

⁴ Trem. P. C. 582.

⁵ 50. Ass. 322. *pl.* 1. Bro. Abr. tit. *Demurrer in Ley*, 25. and see 3 Price, 38. West, 215. Man. L. Ex. 599.

⁶ *Ante*, 1120.

⁷ West, 213. Man. L. Ex. 603.

⁸ Parker, 50. and see 3 Anstr. 753. Man. L. Ex. 603.

⁹ *Id. ibid.* and see Man. L. Ex. 603. (*o.*)

¹⁰ Man. L. Ex. 603.

¹¹ *Id.* 600.

¹² *Ante*, 730.

¹³ Staundf. *Prærog.* 65. a. Hardr. 455. Vaugh. 64.

¹⁴ Trem. P. C. 594.

¹⁵ Bro. Abr. tit. *Traverse d'Office*, *pl.* 20.

¹⁶ Trem. P. C. 594. and see 2 Wms. Saund. 84. (*i.*) Man. L. Ex. 601.

¹⁷ Sav. 19. Com. Dig. tit. *Prærogative*, D. 76. 85. and see West, 213, 14. Man. L. Ex. 600, 601, 2.

¹⁸ West, 214. (*u.*)

¹⁹ Staundf. *Prærog.* 65. a. Com. Dig. tit. *Prærogative*, D. 85.

ings being in his name;^a or if his office be vacant, by the solicitor general.^c

When the replication or demurrer is filed, the defendant must rejoin within *four*, or join in demurrer within *six* days.^a The rule to rejoin or join in demurrer, like the rule to plead, is entered on the back of the writ of extent.^a After replication, the king by his prerogative may waive it, and reply *de novo*, before issue joined, in the same or another term;^d or he may waive his demurrer to the defendant's plea, and reply to issue.^e So, if the defendant demur, the crown, instead of joining in demurrer, may traverse, or confess and avoid, the inducement.^a But the defendant is not allowed to change his ^aplea, or waive it and plead the general issue, without the [*1128] consent of the attorney general.^b So, after issue joined, the king may waive the issue and demur,^c or take another issue, in the same term, though not in another term.^d But if the king join issue upon a traverse of his title, he cannot it seems afterwards waive it, to traverse the title of the defendant;^e at least this cannot be done after the term has expired, and the jury process issued:^f Neither can he waive the issue, after verdict.^g

Issue in fact being joined, the cause may be tried either at bar or *nisi prius*.^h And the king may try it in what county he pleases.ⁱ In practice, however, it is always tried at *nisi prius*, in *Middlesex*.^k And if one of the defendants plead to issue, and another demur, the king may either bring on the trial or demurrer first, as he pleases.^l The king cannot be compelled to proceed to trial: And laches not being imputable to him,^m there can be no trial by *proviso*, when the king is a party;ⁿ but in cases of great delay, the court on motion will it seems give judgment for the defendant or claimant, if the attorney general will not proceed in a reasonable time.^o The notice of trial is of course always given *by*, and cannot be given *to* the crown.^p And when the defendant or claimant resides more than *forty* miles from *London*, he is entitled to *ten* days notice of trial.^q In other cases, he seems to be in strictness entitled to *six* days notice only.^r

Notice of trial being given, the record is entered, and cause called on: And at the trial, the defendant or claimant, being considered as a

^a West, 214. Man. L. Ex. 604.

^c 4 Bur. 2572.

^a R. temp. Jac. II. Man. L. Ex. Append. 232.

^a West, 214. Man. L. Ex. 604.

² Rol. Rep. 41.

^a Cro. Car. 347. Vaugh. 65. Hardr. 455.

Plowd. 322. a.

^a T. Jon. 9, 10. Co. Ent. 402. Man. L. Ex. 602.

^b Cro. Car. 347. 2 Rol. Rep. 41.

^c Staundf. Prærog. 65. b. Plowd. 322.

a. Hardr. 455. Vaugh. 65.

^d 13 Edw. IV. 8. a. Staundf. Prærog.

65. b. Vaugh. 55.

^e Semb. Vaugh. 64. 1 Mod. 276. 13 Edw.

IV. 8. a. pl. 1.

^f Id. ibid. Man. L. Ex. 602.

^g Hardr. 455. and see Com. Dig. tit. Prærogative, D. 85. West, 213, 14. Man. L. Ex. 602.

^h Sav. 2. Cro. Car. 348, 9. Ante, 812.

ⁱ 1 Sid. 412. 1 Vent. 17. Parker, 189.

and see Cro. Car. 348. 2 Price, 113.

^k West, 216. Man. L. Ex. 612. Ante, 812.

^l 1 Str. 266.

^m Co. Lit. 57. b.

ⁿ 6 Mod. 247. and see F. N. B. 241. A. Plowd. 243. b. 2 Leon. 110. pl. 144.

^o Parker, 51. and see 3 Anstr. 753.

West, 216. Man. L. Ex. 612. Ante, 1126, 7.

^p Man. L. Ex. 612.

^q Id. ibid.

^r R. temp. Jac. II. Man. L. Ex. Append. 233. and see West, 216, 17. Id. App. 128.

plaintiff,¹ may be nonsuited;² but the nonsuit on a traverse is peremptory,³ at least after issue joined.⁴ And when the traverser offers to demur upon evidence given for the king, the counsel for the crown [*1129] cannot be compelled to join in demurrer.⁵ The court in such case, however, may direct the jury to find the special matter.⁶

The *verdict* on a traverse, which may be either general or special,⁷ is confined to the points in issue; the jury having no damages or costs, nor any other collateral matter, to enquire into.⁸ And the *postea* being returned, a rule for judgment is given, which is a *four* day rule, when there are so many days between the trial and end of the term; otherwise the rule is for the *last* day of term.⁹ Before the expiration of the rule, the unsuccessful party may move in arrest of judgment: or for a new trial, or judgment *non obstante veredicto*: And when the trial is in vacation, the motion must be made within the first *four* days of the following term.¹⁰

The king being in possession under the extent, is seldom at the trouble of entering up *judgment*, upon a verdict in his favour, unless a writ of error render it necessary.¹¹ The form of the judgment for the king, whether upon a verdict or nonsuit, is that the defendant or claimant take nothing by his traverse:¹² And upon such judgment, no *execution* issues for the king, such execution being anticipated by the extent itself; but the lands, goods, and choses in action, are dealt with, as if no claim had been made.¹³ On the other hand, when the defendant or claimant obtains judgment on the extent, the judgment is, that the king's hands be *removed* from the possession of the goods, &c. and that the defendant or claimant be restored to the possession thereof:¹⁴ and on such judgment being entered, the legal possession is transferred immediately, by operation of law, from the king to the party, who may put himself into actual possession without further process,¹⁵ or sue out a writ of *amoveas manus*, if necessary, to amove the king's hands.¹⁶ On this writ the sheriff must forthwith restore the whole of the property seized, to the defendant or claimant; and has no right to deduct any thing for fees or poundage, or expenses of any kind; the sheriff being entitled to his fees, when he is entitled to them at all, not from the defendant [*1130] or claimant, but from the crown or *prosecutor of the extent.¹⁷ The judgment against the king usually concludes with

¹ *Ante*, 1122.

² 2 Salk. 448. *Ante*, 1123.

³ 9 Hen. IV. 7. 4 Hen. VI. 12. *pl.* 9.

⁴ *Semb.* M. 7 Hen. VII. fo. 13. *pl.* 19.
and see Man. L. Ex. 581. 613.

⁵ Man. L. Ex. 613.

⁶ Co. Lit. 72. a. 5 Co. 104. and see Cro. Eliz. 752. Hughes, 58. Man. L. Ex. 613. And as to demurrers to evidence *by* the crown, see Plowd. 4. 8.

⁷ Hughes, 33.

⁸ Man. L. Ex. 614.

⁹ *Id.* 615. and see *R. temp. Jac.* II. Man. L. Ex. Append. 233.

¹⁰ Man. L. Ex. 615.

• *Id.* 618.

¹¹ Bro. Abr. tit. *Travers d'Office*, 54. 4 Co. 57. b. Staundf. *Prærog.* 77. b. 2 Salk. 448. Bul. Ni. Pri. 216. Man. L. Ex. 618.

¹² Man. L. Ex. 619.

¹³ West, 217. Man. L. Ex. 618. And for the form of an issue and judgment of *amoveas manus* in the Exchequer, on a writ of extent in *aid*, defended by the assignees of a bankrupt, with continuances by imparlance, *vicecomes non misit breve*, and *curia advocari vult*, see Append. Chap. XLII. § 22.

¹⁴ 3 Salk. 145.

¹⁵ West, 217. Man. L. Ex. 620.

¹⁶ West, 217. 236. *Ante*, 1119.

a *salvo jure regis*; the effect of which is to prevent the king's being concluded, with respect to any title which is not expressed in the pleadings.^m

With regard to *costs*, it is a general rule that the king, or any person suing to his use,ⁿ shall neither pay nor receive them; for, besides that he is not included under the general words of the statutes which give costs, as it is his prerogative not to pay them to a subject, so it is beneath his dignity to receive them.^o But there are some exceptions to this rule, created by different statutes: Thus, by the statute 33 Hen. VIII. c. 39. § 54. "the king, in all suits upon any obligations or specialties made to himself, or any to his use, shall have and recover his just debts, costs and damages, as other common persons use to do, in suits and pursuits for their debts."^p This act is confined to suits on obligations or specialties made to the king, or any to his use: And therefore, where a bond debtor to the crown took out an extent in *aid* against his simple contract debtor, the latter was holden not to be liable to pay costs; for though the simple contract debt, when found by inquisition, may be considered as a specialty debt to the king, yet it does not come within the meaning of the term of a "specialty made to the king, or to his use."^p When lands are sold by virtue of the statute 25 Geo. III. c. 35. the monies produced by the sale are directed to be paid, accounted for and applied, towards discharge of the debt due to the crown, and of all *costs* and *expenses* which shall be incurred by the crown, in enforcing the payment of such debt, in such manner as the court of Exchequer shall order and appoint: And, by the statute 43 Geo. III. c. 99. § 41. *costs* may be levied against collectors of taxes, in certain cases.^q But costs are not recoverable on the statute 25 Geo. III. c. 35. even in the case of an immediate extent in *chief*, when goods and lands are seized, the goods alone being more than sufficient to pay the debt levied; this statute being holden to give the crown a right to costs, in cases only when it is necessary to resort to a sale of the lands.^r So, costs are not recoverable on an extent in *aid*, under the statute 53 Geo. III. c. 108. although sued to secure the stamp duties on policies of assurance, in the hands of an insolvent agent of the company, and founded on "their [*1131] bond to the crown, for the due payment of those duties; and although the debt be of such a nature, as that an immediate extent might have been issued on it." The bill of costs of the crown solicitor, for business done under an extent, we have seen,^s is taxable: And if, on the taxation of his bill, a considerable sum be disallowed, the court will not only order the costs of the taxation to be paid to the defendant by the solicitor, but if he have received the whole amount of his bill by sums paid him on account, they will

^m Hil. 9 Edw. IV. fo. 51. pl. 14. F. N. B. 35. P. Hardr. 128. and see M. 2 Edw. II. Fitz. tit. *Voucher*, 208. P. 20 Edw. III. Fitz. tit. *Droit*, 15. Man. L. Ex. 619.

ⁿ Stat. 24 Hen. VIII. c. 8.

^o 3 Blac. Com. 400. and see Cowp. 367. 1 Anstr. 50. 7 Durnf. & East, 367. Hul-

lock on Costs, 21. West, 227. Man. L. Ex. 561, 2.

^p 1 Price, 434. and see 5 Price, 189. 2 Anstr. 369. West, 228. Man. L. Ex. 562.

^q 3 Price, 280.

^r *Id.* 40.

^s 1 Price, 434.

^t *Ante*, *94.

order him to pay interest on the balance reported to be due from him.^a And if a greater sum than is actually due, and costs, have been levied under an extent in aid, out of personal effects;^{*} or received by the prosecutor of the extent or his attorney, under an agreement for a compromise, in order to stay proceedings;⁷ the court on motion will order the surplus and costs which have been so levied, to be refunded to the defendant, together with the costs of the application.⁷

The writ of extent for the *subject* is founded on a recognizance, at common law or by statute; or on a judgment in an action of *debt* against an heir, on the obligation of his ancestor.

A *recognizance* is an obligation of record, which a man enters into before some court of record, or magistrate duly authorized,² with condition to do some particular act: And it is either at common law, or by statute. A recognizance at common law is either to the king, or a subject; and may be acknowledged before any one of the judges out of term, and in any part of *England*, and may be entered on record, as well out of as in term: So, the Chancellor or Keeper may take recognizances and award execution, or hold plea of *scire facias* and *audita querela* in Chancery, to avoid execution, &c. as the case requires, on all recognizances taken in that court.^a By the custom of the city of *London*, the mayor and aldermen, or the mayor singly, may take recognizances; for the custom is not only reasonable in itself, but, as all other customs of the city, has [*1132] been confirmed by act ^{*}of parliament.^b And the king, by special commission, may appoint any person to take recognizances from one man to another; and such recognizances, duly certified with the commission into Chancery, are binding: and though the commission be so particular as to mention only a recognizance to be taken from A. to B. yet the commissioners have a general power to take a recognizance from any other person.^c

But recognizances at common law are not perfect records, till they are *enrolled* in some court of record;^d for since the law allowed any one judge out of court, and in any part of the kingdom, to take these recognizances, which are the highest security of the common law, it was very necessary they should be enrolled, to perpetuate the

^a 9 Price, 349.

^{*} 1 Price, 448. and see 3 Price, 280.

⁷ 5 Price, 189. And see further, as to the law and practice of Extents for the king, in *chief* and in *aid*, Mr. *West's* Treatise on that subject, and Mr. *Manning's* Summary of the Law of Extents, p. 513, &c. *per tot.* from which, as will be seen by the references, the foregoing account of the practice on Extents for the king, has been principally taken. See also Mr. *Chitty junior's* Treatise on the Pre-

rogatives of the Crown, Chap. XII. XIII. in which Extents are fully treated of, with the means of obtaining redress from the Crown.

² Bro. Abr. tit. *Recognizance*, 24.

^a Bac. Abr. tit. *Execution*, (B.) 2 Wms. Saund. 7. (5.)

^b Bac. Abr. tit. *Execution*, (B.) 2 Wms. Saund. 7. (5.)

^c *Id. ibid.* F. N. B. 267.

^d But see 2 Vern. 750. 1 Barn. & Ald. 153.

contract, and by that means secure the creditor his just debt; which must have been very precarious and uncertain, while the security lay in the hands of a private person, who might either through carelessness mislay, or by ill practices be prevailed upon to suppress it.* It is the acknowledgment, however, that gives a recognizance its force as a record, and the enrolment is for safe custody, and notifying it to others: Therefore, although enrolment be necessary to the validity of a recognizance, yet it bound the lands at common law, from the time of the caption.^f

Recognizances by *statute* are either founded on a statute-merchant, or statute-staple; or are in nature of a statute-staple, by the 23 Hen. VIII. c. 6.^g A statute-merchant is a bond of record, acknowledged before the mayor of London, or chief warden of some other city or town, or other discreet men for that purpose chosen and sworn, or before one of the clerks of the statute-merchant, pursuant to the statute of *Acton Burnel*, (11 Edw. I.) enforced and amended by the statute 13 Edw. I. stat. 3. c. 1. *de mercatoribus*. This recognizance is to be entered by the clerk on a roll, which must be double, one part to remain with the mayor or chief warden, and the other with the clerk, who shall write with his own hand a bill obligatory, to which a seal of the debtor shall be affixed, together with the seal of the king, for that purpose appointed.^h

The statute-staple is a bond of record, acknowledged before the mayor of the staple, in the presence of the constables of the staple, or *one of them, pursuant to the statute 27 Edw. III. stat. [*1133] 2. c. 9. To this end, the statute requires that there shall be a seal ordained, which shall remain in the custody of the mayor of the staple, under the seals of the constables; and that all obligations made on such recognizances, shall be sealed therewith.ⁱ This security was only designed for the merchants of the staple, and for debts on the sale of merchandizes brought thither; yet, in process of time, others began to apply it to their own purposes, and the mayor and constables would take recognizances from strangers, surmising that they were made for the payment of money, for merchandizes brought to the staple: To prevent this mischief, the parliament, in the 23 Hen. VIII. reduced the statute-staple to its former limits; and laid a penalty of 40*l.* on the mayor and constables who should extend the benefit of the statute to any but those of the staple. But though the statute 23 Hen. VIII. c. 6. deprived them of this benefit, yet it framed a new sort of security, to be used by all persons, known by the name of a recognizance on the 23 Hen. VIII. or recognizance in the nature of a statute-staple; so called, because this act limits and

* Bac. Abr. tit. *Execution*, (B.) F. N. B. 267. 2 Wms. Saund. 7. (5.)

^f 2 Wms. Saund. 7. (5.) and the cases there cited.

^g For an account of these different securities, and the proceedings thereon, see 2 Wms. Saund. 69. *c. &c.*

^h Bac. Abr. tit. *Execution*, (B.)

ⁱ Bac. Abr. tit. *Execution*, (B.) By the statute 27 Eliz. c. 4. § 7, 8. the whole

tenor and contents of all statutes-merchant and statutes-staple shall, within six months after they are acknowledged, be entered in the office of the clerk of recognizances taken according to the 23 Hen. VIII. c. 6. who is to enter the same statutes in a book provided for that purpose; otherwise they are made void, as against subsequent purchasers.

appoints the same process, execution and advantage, in every particular, as is provided for the statute-staple.^k

A recognizance therefore, in nature of a statute-staple, as the words of the act declare, is the same with the former, only acknowledged before other persons; for, as the statute runs, the chief justices of the King's Bench and Common Pleas, and each of them, or, in their absence out of term, the mayor of the staple at *Westminster* and the recorder of *London* jointly together, shall have power to take recognizances for payment of debts, in the form set down in the statute.^l In this, as in the former cases, the king appoints a seal to attest the contract, and each of the justices shall have the keeping of one such seal, and the mayor and recorder another of the like print and fashion; and every obligation made and acknowledged before either of the justices, or the mayor and recorder, must be sealed with the seal of the conusor, the king's seal, and the seal of the chief justice, or seals of the mayor and recorder before whom it is taken, who are likewise obliged to subscribe their names.^m Besides this, a clerk was appointed to make, write and enrol all obligations thus [*1194] acknowledged, and at the request of the conusee, his executors or administrators, to certify such obligations into Chancery, under his seal.ⁿ

By the last general stamp act,^o "every recognizance, statute-merchant, and statute staple, entered into as a security for the payment of any sum or sums of money, annuity or annuities, or for the transfer of any share or shares in any of the government or parliamentary stocks or funds, or in the stock and funds of the governor and company of the bank of *England*, or of the *East India* company, or *South Sea* company, is subject to the same duty or duties, as a bond given for the like purpose in *England*, where such payment or transfer is not already secured by a bond or mortgage, or by some other instrument, thereby charged with the same duty as a bond or mortgage; and where such payment or transfer is already secured as above mentioned, to a duty of £1: And every recognizance, statute-merchant and statute-staple, entered into as a security for the performance of any covenant, contract or agreement, or for the due execution of any office or trust, or for rendering a due account of money received, or to be received, or for indemnifying any person or persons against any matter or thing, is subject, by the same act, to the duty of 1*l.* 15*s.*: And where any such recognizance or statute, together with any schedule or other matter put or endorsed thereon, or annexed thereto, shall contain 2,160 words or upwards, then for every entire quantity of 1,080 words contained therein, over and above the first 1,080 words, to a further *progressive* duty of 1*l.* 5*s.*"

The statute-merchant having the seal of the conusor, besides the king's seal, the conusee may waive the execution given by the statute

^k Bac. Abr. tit. *Execution*, (B.)

^l 23 Hen. VIII. c. 6. § 2. = *Id.* § 3.

^m 23 Hen. VIII. c. 6. § 4, 5. And for the mode of enrolling these recognizances, and certifying them into Chancery, see

the same statute; also the stat. 8 Geo. I. c. 25, § 1, 2.

^o 55 Geo. III. c. 184. *Sched.* Part I. *Quære*, whether this statute extends to recognizances of bail?

13 *Edw. I.* and use it as an obligation, by bringing an action of *debt* thereon: So may the conusee, for the same reason, on the 23 *Hen. VIII. c. 6.* But it is otherwise of a statute-staple; because the king's seal only is affixed thereto, without that of the party, which is absolutely necessary in all obligations at common law.^p

These several securities bind the land, as against the parties, from the time they are entered into:^q Therefore, if a man be conusee of a statute, and the debtor, before execution sued, alien by fine, and five years pass, yet the conusee may still sue out execution.^r But a creditor by statute of *J. S.* who becomes *bankrupt* before the statute is *sued and executed, shall come in only *pro rata*, though [*1135] there were lands bound by the statute.^s And, by the statute of frauds and perjuries,^t "the day of the month and year of the enrolment of recognizances shall be set down in the margin of the roll, where the said recognizances are enrolled; and no recognizance shall bind any lands, tenements or hereditaments, in the hands of any purchaser *bona fide* and for valuable consideration, but from the time of such enrolment."^u It is also declared by the register acts,^v that "no statute or recognizance (other than such as shall be entered into in the name, and upon the proper account of his majesty,) shall affect or bind any manors, lands, tenements or hereditaments, in *Middlesex* or *Yorkshire*, but only from the time that a memorial of such statute or recognizance shall be entered at the register office, in such manner as therein is directed."

The execution on a recognizance, at common law, seems to have been by *levari facias*, of the lands and chattels of the defendant; under which his corn, and other present profits of his land, might have been taken: For at common law, we have seen,^w the body of the defendant, or his land, could not have been taken in execution, unless in special cases. But, by the statute *Westm. 2.* (19 *Edw. I.*) c. 18. "when a debt is acknowledged in the king's court, (that is, by recognizance in any court of record, that hath power to receive the same,^x) the plaintiff may sue out a writ of *elegit*, under which the sheriff shall deliver to him all the chattels of the debtor, (except his oxen, and the beasts of his plough,) and a moiety of his land, until the debt be levied by a reasonable price or extent." The plaintiff therefore may it seems, since this statute, proceed either by *levari facias* or *elegit* at his election, on a recognizance at common law.^y

On a statute merchant, the first process, after it was forfeited and certified into Chancery, was a writ of *capias si laicus*, directed to the sheriff, commanding him to take the body of the conusor, if a

^p *Bac. Abr. tit. Execution, (B).* And for a fuller account of these securities, the differences between them, and the mode of proceeding thereon, see *Bac. Abr. tit. Execution, (B). Com. Dig. tit. Statute Merchant.*

^q 2 *Bac. Abr.* 363. 3 *Co.* 14.

^r 1 *Chan. Cas.* 268. 1 *Mod.* 217.

^s 1 *P. Wms.* 92.

^t 29 *Car. II. c. 3. § 18.* extended to

Wales and the counties *palatine*, by the 8 *Geo. I. c. 25. § 6.*

^u See 2 *Wms. Saund.* 7. (5). as to the time of enrolment.

^v *Ante*, 975.

^w *Ante*, 1030, 31.

^x 2 *Inst.* 395.

^y *Bro. Abr. tit. Elegit, pl. 6. tit. Execution, pl. 42.* cites 38 *Ed. 3. 12. tit. Recognizance, pl. 7.* cites 38 *Ass. 5. Vin. Abr. tit. Recognizance, F. 1.*

layman, to satisfy the debt:^b And if the sheriff returned upon this writ, that the party was dead, or not found in his bailiwick, a writ issued to extend the lands,^c which might be made returnable in either bench: and the sheriff might thereupon deliver the lands, &c. to the [*1136] conusee, *upon a reasonable extent, without the delay or charge of a *liberate*.^d If the conusor was a *clerk*, the sheriff was directed to levy the debt of his moveable goods and chattels.^e

On a statute staple, or recognizance in nature of a statute staple, if the conusor cannot be found within the staple, nor his goods to the value of the debt, the first process, after the certificate under seal in Chancery, is a writ in nature of an extent, to take the body lands and goods, all in one writ; in which respect it is preferable to the statute merchant, as being a much speedier remedy.^f This writ is returnable in Chancery;^g and the same sort of proceedings are had under it, for extending the lands, &c. as upon an *elegit*.^h But the sheriff, after the extent, cannot deliver the lands, &c. to the conusee, but must seize them into the king's hands; and in order to get possession of them, the conusee must sue out a *liberate*, which is a writ issued out of Chancery, reciting the former writ and return, and commanding the sheriff to *deliver* to the conusee all the lands, tenements and chattels, by him taken into the king's hands, if the conusee will have them, by the extent and appraisement made thereof, until he shall be satisfied his debt.ⁱ Upon this writ, the sheriff cannot turn the tertenant out of possession, as upon an *habere facias possessionem*; but is only to deliver the legal possession, as upon an *elegit*, and in order to obtain the actual possession, the conusee must proceed by *ejectment*.^k

By the common law, after a full and perfect execution had by extent, returned and entered of record, the conusee could have no re-extent on the effects of the conusor, (because there was one satisfaction given to the creditor on record,) though the lands had been recovered from him before he had levied the debt out of them.^l But by the statute 32 *Hen. VIII. c. 5.* it is provided, that "if after any lands, tenements or hereditaments, be had and delivered in execution, upon a just and lawful title, wherewithal the said lands, &c. were liable, tied and bound, at such time as they were delivered and taken into execution, shall be recovered, divested, taken, or evicted out of or from the possession of any such person and persons [*1137] as have and hold the same in execution, without any fraud, deceit, covin, collusion, or other default of the said tenant or tenants by execution, before such time as the said tenants by execution, their executors or assigns, shall have fully levied their whole debt and

^b F. N. B. 130. Append. Chap. XLII. § 23.

^c F. N. B. 130. A. Append. Chap. XLII. § 24.

^d F. N. B. 130. A. 1 Vent. 41.

^e F. N. B. 131. 2 Wms. Saund. 70. b. Append. Chap. XLII. § 25. *Ante*, 1088.

^f 2 Bac. Abr. 334. Append. Chap. XLII. § 26.

^g 4 Inst. 79. But the execution upon

a statute merchant is returnable either into the King's Bench or Common Pleas. *Id. ibid.*

^h *Ante*, 1074, 5.

ⁱ F. N. B. 132. 1 Lutw. 429. Append. Chap. XLII. § 27.

^k 1 Vent. 41. *Ante*, 1077. And for the form of the inquisition on this writ, see 2 Wms. Saund. 70. c. d.

^l Co. lit. 290. a. Bac. Abr. tit. *Execution*, (B. 6.)

damages, for which the said lands, &c. were delivered and taken in execution; then every such recoveror, obligee and recognizee, shall have a *scire facias*, out of the same court from whence the former execution did proceed, against such person or persons as the former execution was pursued, their heirs, executors or assigns, to have execution of other lands, &c. liable to be taken in execution, for the residue of the debt or damages."

This statute, by a favourable construction, was extended to the executors, administrators and assigns of the recoveror,^m &c.; and to executions issuing out of any court, where the record is removed by writ of error and affirmed.ⁿ But the statute, we have seen, did not extend to a partial eviction.^o By a subsequent statute^p however, which was made for supplying some defects in the statute 23 Hen. VIII. c. 6. it is enacted, that, "in case it shall, at any time or times, before or after the filing or returning of any *liberate* or *liberates*, sued out on any extent or extents, upon a recognizance in the nature of a statute-staple, be made appear to the court of Chancery, that sufficient has not been extended and levied, or sufficiently extended and levied, to satisfy such recognizance; or that any omission, error or mistake has happened, in making, suing out, executing or returning any of the said writs, or any process thereupon; or it should happen, that any lands, tenements or hereditaments shall be evicted from any person or persons, who shall have extended the same, by virtue of any such writ or process as aforesaid; that then, and in every such case, the said court of Chancery shall and may award one or more re-extent or re-extents, for the satisfying the same as aforesaid, and that writs of *liberate* or *liberates* may be sued out thereupon."^q

By the statute 23 Hen. VIII. c. 6. § 8. there was due to his majesty, a fee of one *half-penny* in the pound, according to the value or sum entered into and contained in every recognizance in nature of a statute-staple, taken in pursuance of the said statute, to be paid on sealing the first process on every such recognizance. But, by the 9 Geo. I. c. 25. § 3. "the prosecutor of every such recognizance shall, at the time of suing out the first process, or writ of extent thereon, *deliver in to the officer who shall make out such [*1138] process or extent, a note in writing under his hand, testifying the sum or value of the damages thereby intended to be extended, or levied thereon; which sum or value the said officer shall insert in the said writ, to be only extended or levied thereon, and no more; and that the said poundage of one *half-penny*, payable on all process as aforesaid, shall be taken and paid only for every pound, according to the said sum or value so inserted and intended to be extended and levied as aforesaid, and not otherwise: and that no sheriff of any county shall take for the extent and *liberate*, and *habere facias possessionem* or *seisinam* on the real estate, and levy on the personal estate, by virtue of such extent, any more than the same fees as are appointed by the 3 Geo. I. c. 15. for executing a writ of *elegit*,

^m Co. Lit. 290. a.

ⁿ *Id. ibid.* ^o *Ante*, 1077.

^p 8 Geo. I. c. 25. § 4.

^q 4 Wms. Saund. 70. d.

and *habere facias possessionem* or *seisinam*; under the like penalties and forfeitures, and to be in like manner recovered, against every sheriff or person therein offending, as are mentioned and appointed in and by the same act."

We have before seen, that in *debt* against an heir, on the obligation of his ancestor, the judgment for the plaintiff is *general*, for the debt and damages, or *special*, directing them to be levied of the lands descended.² On a general judgment, the execution may be general also, against the defendant, his goods and chattels, or a moiety of his lands, by *feri facias, capias ad satisfaciendum*, or *elegit*.³ But when the judgment is special, the execution is so likewise, by a writ in nature of an extent, to levy the debt and damages, of all the lands descended.⁴ And it seems that on a general judgment, although the plaintiff may have execution by *elegit* of a moiety of all the heir's lands, yet may he also at his election surmise, that the heir hath certain lands by descent, and pray to have execution of the whole of them.⁵ For if the plaintiff had not this election, he might be a loser by the general writ of *elegit*, upon which he could have only a moiety in execution, inasmuch as the heir might not have any other lands except those descended.⁶

² *Ante*, 970, 71. and see 3 Co. 72. a. Cro. Jac. 450. 3 Salk. 287. 2 Wms. Saund. 7. (4.)

³ 2 Rol. Abr. 71. and see Vin. Abr. tit. *Heir*, (D.) Bac. Abr. tit. *Heir & Ancestor*, (H.) 2 Wms. Saund. 7. (4.)

⁴ *Id. ibid. Off. Brev.* 83, 4. Append. Chap. XLII. § 28, 9.

⁵ Append. Chap. XLII. § 30.

⁶ 2 Rol. Abr. 72. Bac. Abr. tit. *Heir & Ancestor*, (H.) 2 Wms. Saund. 7. (4.)

CHAP. XLIII.

OF WRITS OF SCIRE FACIAS; AND THE PROCEEDINGS THEREON.

A *Scire Facias* is a writ founded on some matter of record, as a recognizance or judgment, &c. on which it lies to obtain execution,^a or for other purposes,^b as to repeal letters patent,^c hear errors,^d &c. In general, it is a *judicial* writ, issuing out of the court where the record is: but a *scire facias* to repeal letters patent is an *original* writ,^e issuing out of Chancery; and though in other cases it is a *judicial* writ, yet because the defendant may plead thereto, it is considered in law as an *action*:^f therefore, a release of all *actions* is a good bar to a *scire facias*:^g And for the same reason, there must be a new warrant, to authorize the appearance of the plaintiff's attorney;^h and there is no occasion for a rule to change the attorney in the former suit.ⁱ So, where a judgment was entered for securing the payment of an annuity, before the 17 Geo. III. c. 26. which requires that "before any execution shall be sued out, or *action* brought on any such judgment, a memorial of the consideration, &c. shall be enrolled in Chancery;" the court of King's Bench set aside a *scire facias*, &c. issued after the act, to revive the judgment, for want of such a memorial.^k A *scire facias*, disclosing the facts upon which it is founded, and requiring an answer from the defendant, *was in one case said to be in nature of a *declaration*:^l And [*1140] when the object of it is to obtain execution, on a judgment or recognizance, &c. it is properly called a writ of *execution*.^m

^a Bac. Abr. tit. *Scire facias*, A. Lit. § 505. Co. Lit. 290. b. 291. a. F. N. B. 267. and see 3 Lev. 220.

^b Bac. Abr. tit. *Scire facias*, A. B.

^c Id. C. 3. For the proceedings in general on writs of *scire facias*, see Bac. Abr. tit. *Execution*, H. Com. Dig. tit. *Pleader*, (3 L.) Run. Eject. 477, &c. 2 Wms. Saund. 6. (1.) 71. (4.) 72. (5, 6.) Bingham on *Executions*, 118, &c. In treating of these proceedings, as well as those on writs of error, the reader will observe, that the learned editor of *Saunders* has followed pretty closely the order and arrangement in this and the following chapters.

^d Post, Chap. XLIV.

^e Append. Chap. XLIII. § 6. and see Skin. 682. Comb. 455. S. C. where it is said, that though a *scire facias* be properly a *judicial* writ, yet being the foundation of an action, it is sometimes considered as in nature of an *original*.

^f Co. Lit. 290. b. 291. a. 2 Wils. 251. 2 Blac. Rep. 1227. 2 Durnf. & East, 46.

^g Co. Lit. 290. b. Comb. 455. Skin. 682. S. C. 2 Ld. Raym. 1048. 2 Wils. 251.

^h Cro. Eliz. 177. 2 Ld. Raym. 1048. 1252. 3. 1 Salk. 89. 2 Salk. 603. S. C. and see 2 Bos. & Pul. 357. (b.) *Ante*, *108.

ⁱ Say. Rep. 218. and see 7 Durnf. & East, 337. 2 Bos. & Pul. 357. *Ante*, *108.

^k 1 Durnf. & East, 267, 8.

^l 1 Sid. 406.

^m Lit. § 505.

A *scire facias* is either for the *king* or the *subject*. For the former, it is either to have execution on a judgment or recognizance, &c. or for other purposes, as to repeal letters patent, &c. On a judgment or recognizance, there need not be any *scire facias* for the king, where more than a year has elapsed since the judgment was recovered, or recognizance acknowledged; for *nullum tempus occurrit regi*.^a but the regular mode of proceeding thereon is by suing out an extent in *chief*, against the body, lands and goods of the crown debtor; and, after his death, a *scire facias* is unnecessary, the proceeding in that case being by writ of *diem clausit extremum*, against his lands and chattels. A *scire facias*, however, is sometimes issued on a recognizance, if it be doubtful whether it is forfeited.^o

When the debt arises on a bond or obligation, taken pursuant to the statute 33 Hen. VIII. c. 39. which is declared to have the same force and effect as a statute staple, the ordinary mode of proceeding against the principal or sureties, when solvent, is by *scire facias*, to have execution thereof; or, upon an affidavit of danger, and the *fiat* of a baron, the king, we have seen,^p may proceed by suing out, in the first instance, an immediate extent in *chief*; but without such an affidavit, a *scire facias* is the only course.^q And this is also the common mode of proceeding against sureties;^r or for the recovery of debts found to be due to the king's debtor from other persons, when solvent, by inquisition on writs of extent,^s or *diem clausit extremum*, or on a special *capias utlagatum*.^t

The *scire facias* to have execution for the debt of the king, is a judicial writ, issuing out of, and under the seal of the court of Exchequer: And it may be issued of course, without the *fiat* of a baron.^u In point of form, it recites the judgment, recognizance, bond, or commission and inquisition, on which it is founded; and commands the sheriff to warn the defendant, to appear before the barons of his majesty's Exchequer at *Westminster*, on a day certain, to shew cause, why the crown should not have execution of the sum re-[*1141] covered, acknowledged, or found to be due:^v And every *scire facias* for debts in *aid*, must be awarded into the proper county where the debtor is mentioned in the specialty to reside, unless upon a *scire facias* returned in *London* and *Middlesex*.^w This writ is signed by the king's remembrancer, and *tested* in the name of the chief baron:^x And though it may be sued out in vacation, yet it must be always *tested* and returnable in term: Therefore, a *scire facias* cannot be sued out in vacation, on an inquisition taken under an extent, after the end of the preceding term; because as the *scire facias*, if sued out in vacation, must be tested as of the antecedent

^a 2 Salk. 603. and see Gilb. Excheq. 166, 7. 1 Price, 395. West, on *Extents*, 316, &c. *Ante*, 1090.

^o Gilb. Excheq. 166. Trem. P. C. 613, 14. *Ante*, 1091, 2.

^p *Ante*, 1091, 2.

^q 3 Price, 288. 292. and see Gilb. Excheq. 168. *Ante*, 1092.

^r *Ante*, 1092.

^s *Ante*, 1092. 1116.

^t *Ante*, *156.

^u 3 Price, 279.

^v Append. Chap. XLIII. § 1. and see Trem. P. C. 572. 600. 608. Gilb. Excheq. 177.

^w Gilb. Excheq. 168. R. H. 15 Car. Lin. Scac. Id. 178. West, Append. 126. Man. L. Ex. Append. 230.

^x West, 316.

term, and must recite the inquisition as the foundation of it, it would appear in such case, that the *scire facias* was sued out before the inquisition was taken on which it is founded: And accordingly the court of Exchequer, in a late case,^a quashed the *scire facias* on motion; and ruled, that the objection could not be got rid of by a special *memorandum* upon the record, shewing the day on which the *scire facias* was really issued. But where a *scire facias*, founded on an inquisition, mis-recited the inquisition, and fixed by such recital a day on which the debt had been found to be due, differing from the true day mentioned in the inquisition, the court of Exchequer (on cause being shewn,) gave leave to amend the writ, on payment of costs, &c. even after the defendants had pleaded.^b

On this writ, if the sheriff warn the defendant, he returns *scire feci*;^c if he do not warn him, he returns *nihil*,^c in which latter case a second *scire facias* issues. On the return of *scire feci*, or of two *nihils*, a *four* day rule is given on the writ, for the defendant to appear and plead thereto, or an extent to issue;^d and when the *scire facias* is returnable on the last day of term, a rule may be given to appear by the sealing day after that term. If the defendant appear, then another *four* day rule is given, for the defendant to plead, or an extent to issue;^e and after the expiration of *four* days, the defendant may obtain *six* weeks further time to plead, on a motion of course, on the signature of counsel: and he may obtain further time, after the expiration of the six weeks, by motion in court, on an affidavit of special circumstances.^f If the defendant do not appear on the **first* rule, or appearing, do not plead on [*1142] the second, judgment may be entered up for the king;^g or process of extent may issue, without any judgment on the *scire facias*:^h And it is an indulgence in the court that they do not enter up judgment; for if judgment were entered, then the court would be concluded, though perhaps the defendant had no notice of the debt.ⁱ The defendant having appeared to the *scire facias*, may either move the court to set aside the proceedings, if irregular;^k or, after declaration,^l plead in abatement or in bar, or demur, as in other actions.^m And the statute of limitations may be pleaded to a *scire facias*, issued by the crown against the drawer of a bill of exchange, in the hands of the crown debtor, and which has been seized by the sheriff under an inquisition, on prerogative process.ⁿ

In treating of the *scire facias* to repeal letters patent, it will be proper to consider, 1st, in what cases it lies, and in what not; 2dly, the writ itself, and mode of suing it out; and 3dly, the proceedings thereon. If the king grant any thing which by law he cannot grant, he, *jure regio*, for the advancement of justice and right, may

^a 3 Price, 288. West, 316, 17. S. C.

^b 4 Price, 181.

^c Trem. P. C. 609.

^d West, 317. and see Gilb. Excheq. 168, 9. Append. Chap. XLIII. § 3.

^e Gilb. Excheq. 169. Append. Chap. XLIII, § 4.

^f West, 318.

^g Gilb. Excheq. 169. Parker, 94.

^h West, 317, 18.

ⁱ Gilb. Excheq. 170.

^k 3 Price, 278, 290, 91.

^l Append. Chap. XLIII. § 2.

^m For the form of an issue in *scire facias*, on an extent in *aid*, against the assignees of a bankrupt, see Append. Chap. XLIII. § 5.

ⁿ 6 Price, 24.

have a *scire facias* to repeal his own letters patent;^o as if he grant lands which were conveyed to the king by covin, to defeat a subject of his seigniority:^p But if the patent be void in itself, *non concessit* may be pleaded, without a *scire facias* to repeal it.^q So, if the king's grant be founded upon a fraud, or false suggestion, he may have a *scire facias* to repeal it;^r as if the patent recite another to have an office, who had in truth forfeited it, and grant it when it shall happen to be vacant, after the death, surrender, &c. of that other;^s or that the invention, for which it was granted, was a new one, when it had been previously invented, or used by others. And it is said to have been determined, that the failure of one of several subjects of a patent, vitiates the whole; because, the consideration being entire, it cannot be avoided as to part, and remain good as to the rest.^t So, if an officer make a forfeiture of his office, granted by patent, the king may have a *scire facias* for repealing his patent;^u and that, without [*1143] an inquisition or office found of the forfeiture.^x So if the king, by his letters patent, grant the same thing to two persons, the first patentee may have a *scire facias* to repeal the second patent;^y but the second patentee cannot bring a *scire facias*, though the better right should be in him:^z And in general, when a patent is granted to the prejudice of another, he may have a *scire facias* to repeal it, at the king's suit; as if a market, fair, &c. be granted to the annoyance and prejudice of an ancient market, or fair of another.^a It has indeed been holden, that the person prejudiced by the patent may, upon the inrolment of it in Chancery, have a *scire facias* to repeal it, as well as the king.^b

The *scire facias* for repealing letters patent is an *original writ*, issuing out of Chancery; and is usually directed to the sheriff of *Middlesex*, and returnable in the petty bag office, for it is a record there:^c Or it may be brought in the King's Bench;^d and if it be returnable there, that court only have jurisdiction to examine the irregularity of the issuing, and return,^e &c. This writ ought to be founded on some matter of record: And therefore, a *scire facias* to repeal a patent ought to be in Chancery, when the patent is upon record; or in a court where a forfeiture, or other cause of repeal, appears by office, or other matter upon record in the same court.^f But the patent itself is a sufficient record, upon which a *scire facias* may be founded for repealing it.^g So an inquisition, which finds a patent and cause of forfeiture, is a sufficient ground for a *scire facias*,^h or an information or indictment for an offence which is a

^o 4 Inst. 88.

^p Dyer, 269. a.

^q 2 Rol. Abr. 191. (S.) pl. 2.

^r 4 Inst. 88. Bro. Abr. tit. *Patent*, 14.

tit. *Petition*, 11. 11 Co. 74. b. 2 Rol. Abr. 191. (T.)

^s Dyer, 197. b.

^t Law. Rep. 5. but see Holt, *Ni. Pri.* 64. *contra*.

^u Dyer, 197. b. 198. a. 211. a.

^x Dyer, 211. a.

^y 4 Inst. 88. Dyer, 197. b. 193. a. 2 Rol.

Abr. 191. (U.) pl. 2.

^z Dyer, 276. 7.

^a *Id.* 276. 3 Lev. 220. 2 Vent. 344. S. C.

^b 6 Mod. 229. and see 2 Wms. Saund.

^c 72. g. Com. Dig. tit. *Patent*, F. 6. 7. Durnf. & East, 367.

^d 4 Inst. 88. 3 Lev. 223.

^e 4 Inst. 72. but see 6 Mod. 229.

^f 6 Mod. 229.

^g 3 Lev. 223. and see 6 Mod. 229.

^h 3 Lev. 223.

ⁱ Com. Dig. tit. *Patent*, F. 7.

cause of forfeiture, and a conviction thereon.^b Previously to suing out the writ, a *petition or memorial*^c must be presented to his majesty, and a *warrant*^k obtained thereon to the attorney-general, upon which he will grant his *fiat*,^l for suing it out: but it is said, that when a patent is granted to the prejudice of a subject, the king of right is to permit him, upon petition, to use his name for the repeal of it, in a *scire facias* at the king's suit, in order to prevent multiplicity of actions upon the case, which will lie notwithstanding such void patent.^m In point of form, the *scire facias* recites the patent, and states the ground upon which it is meant to [*1144] be impeached; as, if the patent be for a new invention, that the patentee was not the first and true inventor; but that it had been previously invented, or used by others:ⁿ And a *scire facias* by the king to repeal a patent, upon the forfeiture of an office, ought to set forth the cause of the forfeiture:^o but it is not necessary to do so, in a *scire facias* by a former patentee:^p and if the writ allege matter by the words, "whereas we are given to understand and be informed," &c. it is well enough; for they are sufficient to put the party to answer.^q A *scire facias* out of the petty bag office, to repeal a patent, returnable before the king in his Chancery, *ubicunque*, &c. generally is good, without limiting it to *England*.^r

The judgment on a *scire facias* for repealing letters patent, may be either by confession or default: If the defendant can say nothing for maintaining the patent, judgment may be for annulling it, upon his confession;^s or if he do not appear, upon *scire feci* or two *nihils* returned, judgment shall be given in like manner for his default.^t If he appear to the writ, he may plead thereto, in abatement or in bar; or he may demur upon the *scire facias*, if the matter alleged be not sufficient for a repeal of the patent.^u If the writ be returnable in the petty bag office, and issue be joined thereon, the court of Chancery cannot try it by a jury; but the chancellor delivers the record to the court of King's Bench, to be tried there:^x and though it is said, that after trial had, the record is to be remanded into Chancery, and judgment to be there given; yet the practice has been to give judgment in the King's Bench:^y And if there be a demurrer to part, and issue on the residue, the chancellor delivers the whole record to the court of King's Bench, and judgment is given there upon the demurrer, as well as upon the issue.^z Formerly, it seems, the chancellor used to deliver the record *propria manu*, to the court of King's Bench himself; but the present course is to deliver it by the clerk of the petty bag; for what is done by his officer, may be said to be with the proper hand of the chancellor:^a And it is not necessary that the issue should be tried at bar: It may be tried at

^b Com. Dig. tit. *Patent*, F. 7.

^c 2 Rich. Pr. C. P. 391.

^d *Id.* 392.

^e *Id.* 395.

^f 2 Vent. 344.

^g Append. Chap. XLIII. § 6. Lil. Ent. 411. 2 Rich. Pr. C. P. 395.

^h Dyer, 198. b. 2 Rich. Pr. C. P. 395.

ⁱ Dyer, 198. b.

^j 3 Lev. 222.

^k 1 Str. 146.

^l Dyer, 197. b.

^m *Id. ibid.* 198. a. 2 Rol. Abr. 192. (X.) pl. 1. and see 2 Durnf. & East, 554. 557.

ⁿ 3 Lev. 221.

^o 1 Eq. Cas. Abr. 128.

^p *Id.* pl. 7. (b.)

^q Latch, 3. 1 Eq. Cas. Abr. 128.

^r 1 Eq. Cas. Abr. 128, 9. 2 Wms. Saund. 6. (1.)

nisi prius.^b And if, on a *scire facias* to repeal the grant of a market, [*1145] it be found that the *grant* was to the prejudice of another, it is sufficient, though it be not found that the *user* was prejudicial.* The judgment in a *scire facias* for repealing a patent is, that "the said letters patent of our said lord the king be revoked, cancelled, vacated, annulled, void, invalid, and altogether held for nothing; and that the enrolment thereof be cancelled, quashed, and annulled."^d On this judgment, the prosecutor is not entitled to his costs; it being holden, that the statute 8 & 9 W. III. c. 11. § 3. giving costs in all suits upon writs of *scire facias*, does not extend to a *scire facias* to repeal a patent, prosecuted in the name of the king.*

A *scire facias* for the *subject* is in general founded on a recognizance or judgment: Upon the former, it is an *original* proceeding; but upon a judgment, it is only a *continuation* of the former suit; and therefore, where the defendant's attorney, pending an action, agreed that no writ of error should be brought, and afterwards the defendant died, between the execution and return of the writ of inquiry, and thereupon a *scire facias* issued against his executors, to shew cause why the damages assessed upon the writ of inquiry should not be recovered against them, upon which they brought a writ of error; the court of King's Bench held, that the executors were bound by the agreement of their testator's attorney, and accordingly ordered him to *nonpros* the writ of error:^f for this is not a new action, but a continuation of the old one; it is only a *scire facias* to revive the former judgment; and as the testator himself, if he had lived, could not have brought a writ of error, so neither can his executors.^f

Recognizances, we have seen,^g are at common law, or by statute; and the latter are either founded on a statute merchant or statute staple, or are in nature of a statute staple, by the 23 Hen. VIII. c. 6. But a distinction is to be made, with regard to the time of suing out execution, between recognizances at common law, and statutes merchant, &c.; for, upon the former, if the conusee did not take out execution within a year after the day of payment assigned in the recognizance, he was obliged to commence the suit again by original; the law presuming the debt might have been paid, if he did not sue out execution within a year after the money became payable. This was altered by the statute *Westm. 2. (13 Edu. 1.) stat. 1. c. 45.* which gives the conusee a *scire facias* to revive the recogni- [*1146] zance, *and put it in execution, if the conusor cannot stay it, by pleading such matters as the law judges sufficient for that purpose, such as a release, &c. But the conusee of a statute merchant, &c. may at any time sue execution, without the delay or charge of a *scire facias*.^h

^b Cro. Car. 313.

^c 1 Str. 43.

^d 4 Inst. 88. Dyer, 197. b. And for the proceedings in general, on a *scire facias* to repeal a patent, see Com. Dig. tit. *Patent*, F. 2 Wms. Ssund. 73. p. q. Chit.

Prærog. 330, 31.

^e 7 Durnf. & East, 367.

^f 1 Durnf. & East, 388.

^g *Ante*, 1131.

^h Bac. Abr. tit. *Execution*, B. 2, 3. tit. *Scire facias*, C. 2.

Another distinction is to be made between recognizances at common-law, and by statute; for on the first, if the conusee die before execution sued, his executor shall not sue it, even within the year, without bringing a *scire facias* against the conusor: The reason is, because the law presumes that the debt might have been paid to the testator, and therefore will not suffer the debtor to be molested, unless it appear that he hath omitted to perform the recognizance, and for that purpose a *scire facias* must be brought by the executor; for the alteration of the person altereth the process at common law. But this tending to delay, the *scire facias* was taken away, on recognizances created by statute law, by the several acts of parliament which introduced them; and therefore, upon the death of the conusee of a statute merchant, &c. his executors may come into Chancery, and upon producing the testament and the statute, have execution without a *scire facias*, as the testator himself might have had.¹

But the recognizance which will here principally claim our attention, is the recognizance entered into by the *bail* in an action, or upon a writ of error, either alone or jointly with the principal. The *form* of the recognizance of bail in an action differs, accordingly as the action is by *bill* or *original*: In actions by *bill*, in the King's Bench, the undertaking of the bail is general, that if the defendant be condemned in the action, they will pay the condemnation money, if the defendant shall not pay the same, or render himself to the prison of the marshal.² In actions by *original* in the King's Bench, as well as in the Common Pleas, their recognizance is taken in a penalty or sum certain, being double the amount of the sum sworn to, or 1000*l.* beyond that sum, if it exceed 1000*l.*, upon the like condition.³ Therefore, if the defendant be condemned in the action, and do not pay the condemnation money, or render himself to the prison of the marshal or warden, in due time, or if there be several defendants, and they do not all render themselves,⁴ the recognizance is forfeited, and the bail are liable to be sued thereon, unless discharged by some *of* the means stated in a preceding [*1147] chapter:⁵ And a *cognovit* by the principal, without notice to the bail, does not discharge them;⁶ unless time be given to the former, beyond that in which the plaintiff would have been entitled to judgment and execution, had he gone to trial in the original cause.⁷ But if the principal be not condemned, or (which is tantamount,) be not condemned in the same action, as where the plaintiff declares against the defendant, for a different cause of action from what is expressed in the process,⁸ or affidavit to hold to bail,⁹ or, by *original* in the

¹ *Id. ibid.* And see further, as to the *scire facias* on recognizances at common law or by statute, 2 Saund. 6. (1.) 71. *b. c.* and for the *scire facias ad rehabendum terram*, which lies for avoiding executions on statutes merchant, &c. see Bac. Abr. tit. *Scire facias*, 414, 15. 2 Saund. 72. (5, 6.)

² *Ante*, *275.

³ *Id. ibid.*

⁴ 2 Lev. 195. 1 Vent. 315.

⁵ Chap. XIII. p. 292, &c.

⁶ 5 Durnf. & East, 277. and see 4 Taunt. 456. 5 Taunt. 319. 1 Marsh. 59. S. C. *Ante*, *315.

⁷ 4 Taunt. 456. 5 Taunt. 319. 1 Marsh. 59. S. C. and see 1 Taunt. 159.

⁸ 1 Str. 202. 2 H. Blac. 278.

⁹ 6 Durnf. & East, 363. 7 Durnf. & East, 80.

King's Bench, in a different county from that where the action is brought,* his bail are discharged: And they are also discharged when the cause is referred to arbitration, unless it be agreed on the reference, that a verdict shall be taken, and judgment entered for the plaintiff's security.[†]

Before any proceedings can be had against the bail in the action, upon their recognizance, a *capias ad satisfaciendum* must be sued out against the principal, and returned *non est inventus*: For it is clearly settled, that no *scire facias*, or action of *debt*, lies against the bail in the action, until a *non est inventus* be returned, upon a *capias ad satisfaciendum* against the principal; for the bail are not bound to render the principal, till they know, by the plaintiff's suing out this writ, that he means to proceed against the person of the defendant:^a And where the defendant having put in and perfected bail, a *capias ad satisfaciendum* was lodged and returned *non est inventus*, and proceedings being had against the bail, they rendered the principal in time, after which the defendant was bailed again and discharged; the court held, that proceedings could not be had against the last bail, without taking out a fresh *capias ad satisfaciendum*.^b If the principal be already in custody of the sheriff, on *civil* process,^c or a *criminal* charge,^d the sheriff will not be justified in returning *non est inventus*: but otherwise this return will be good, though the plaintiff knew where to find the defendant:^e And where the defendant had surrendered in discharge of his bail, [*1148] before the return of a *writ of *capias ad satisfaciendum*, which had been sued out by the plaintiff, and lodged with the sheriff, for the purpose of fixing them; and afterwards became bankrupt; the court of Exchequer, on motion, refused to quash the writ, although the plaintiff would have undertaken to enter an *exoneretur* on the bail-piece, and made an affidavit that it was not his intention to take the defendant in execution.^b The writ of *capias ad satisfaciendum*, if regularly sued out and returned, may be filed at any time; the filing being mere matter of form.^c But if the principal die after the return of the *capias ad satisfaciendum*, and before the return is filed, the bail are fixed; and the court will not stay the filing of the return in favour of the bail.^d

The *capias ad satisfaciendum* against the principal, should be directed to the sheriff of the county where the original action was laid. And, in the King's Bench, when the proceedings are by *bill*, there must be *eight* days, or, if by *original*, *fifteen* days between

* 3 Lev. 235. R. E. 2 Geo. II. K. B. Rep. C. P. 251. 16 East, 2. Barnes, 116.

[†] *Ante*, 892.

^a Poph. 186. W. Jon. 29. 139. Cro. Car. 481. Sty. Rep. 281. 288. 323. 2 Lutw.

1273. 1 Ld. Raym. 156. 10 Mod. 267. R.

E. 5 Geo. II. reg. 3. a. K. B.

^b 1 Barn. & Ald. 212.

^c *Per Cur.* M. 42 Geo. III. K. B. 1 New

² Maule & Sel. 238.

^a *Sillitoe v. Wallace & another*, bail of *Cawthorne*, M. 43 Geo. III. K. B.

^b 8 Price, 512.

^c 1 Lev. 225. 3 Bur. 1360. 1 Blac. Rep. 393. S. C.

^d *Field v. Lodge*, E. 24 Geo. III. K. B.

6 Durnf. & East, 284.

† Or where the defendant was abiding in the county, ready and willing to render his body, and did not avoid the execution. 15 *Mass. Rep.* 230.

the *teste* and return of the writ;^a the latter being a case excepted out of the statute 13 Car. II. stat. 2. c. 2. § 7. This writ must be made returnable, like the former proceedings, on a day certain, or general return day: And, in order to charge the bail, it must lie *four* days exclusive in the sheriff's office,^f which must be the *last* four days before the return;^g and *Sunday* is not reckoned as one of them.^h It appears that two books are kept in the sheriff's office, wherein entries are made of writs of *capias ad satisfaciendum* against principals: the one a *public* book, for such writs to be returned *non est inventus*, and on which no warrant is issued or proceedings had, and in which book the bail and all other persons may search; the other a *private* book, from which warrants are made out for actual arrest.ⁱ But, in order to fix bail, the *capias ad satisfaciendum* must be entered *four* days in the *public* book in the office, and not in the *private* book.^j In the Common Pleas, there must be *fifteen* days between the *teste* and return of the *capias ad satisfaciendum*,^k which must be *tested* in or after the term in which the judgment was signed against the principal: and therefore, where it was tested of a prior term, the court of Common Pleas set aside the proceedings against the bail.^l *In that court also, the writ must lie [*1149] in the sheriff's office, *four* days exclusive before it is returnable.^m

Upon the return of *non est inventus* to the *capias ad satisfaciendum*, the recognizance being forfeited, the plaintiff may proceed thereon against the bail in the action, by action of *debt*, or *scire facias*: And the proceeding may be commenced on the return day, or, by *original*, on the *quarto die post* of the return, of the *capias ad satisfaciendum* against the principal.ⁿ But, by the statute 1 Geo. IV. c. 87. § 4. "no action or other proceeding shall be commenced upon any recognizance or security, entered into pursuant to the provisions of that act, after the expiration of *six* months from the time when possession of the premises, or any part thereof, shall actually have been delivered to the landlord." In *debt*, the plaintiff may bring one action against all the persons bound in the recognizance, or several actions against each of them: But one *scire facias* seems in all cases to be sufficient; and the recognizance being joint and several, it is holden that the execution may be several, though the *scire facias* was joint; for the judgment is not to *recover*, but to have *execution* according to the recognizance.^o

In an action of *debt* upon a recognizance of bail, the defendant cannot be arrested; for the sufficiency of the bail must have been proved or admitted, previous to their being allowed; and if the defendant were arrested in such an action, there would be bail *in infinitum*.^p And when a writ is sued out upon a recognizance of bail,

^a 2 Salk. 602. 2 Ld. Raym. 1177. S. C. Sel. 323.
R. E. 5 Geo. III. reg. 3. a. K. B.

^f 2 Salk. 599. R. E. 5 Geo. II. reg. 3. a. K. B. and see 4 Barn. & Ald. 538.

^g 13 East, 588.

^h 1 Barn. & Ald. 528. and see 11 East, 271. 2 Chit. Rep. 192. 2 Dowl. & Ryl. 869.

ⁱ 2 Chit. Rep. 102. and see 5 Maule &

^j Barnes, 76.

^k 1 H. Blac. 74. Imp. C. P. 539.

^l Cas. Pr. C. P. 34. Barnes, 64.

^m 8 Durnf. & East, 628. and see 2 Ld.

Raym. 1567. 2 Str. 866. S. C.

ⁿ Bac. Abr. tit. *Execution*, G. 1 Lev. 225. 1 Sid. 339. S. C.

^o *Anle*, *194.

it is necessary, that after the words "*in a plea of trespass*," there should be inserted the following clause, "*and also to a bill of the said plaintiff, against the said defendant, in a plea of debt upon recognizance, according to the custom of our court before us to be exhibited*;" otherwise the defendant, or his attorney, is not bound to accept a declaration in *debt* upon such recognizance.¹

We have already seen,² what time the bail are allowed to render their principal, when they are proceeded against in an action of *debt* upon their recognizance. We have also seen,³ that in an action of *debt* on recognizance, when the proceedings are stayed on payment of debt and costs, the bail must pay the costs in that, as well as the debt and costs in the original action, though they apply within the [*1150] time allowed them for surrendering the principal: And on that account, it is in general more advisable to proceed against the bail, by action of *debt* on the recognizance, than by *scire facias*, wherein no costs are allowed, unless they appear and plead, or join in demurrer.⁴ There is also a further reason for proceeding by action of *debt* on the recognizance, namely, that in such an action, the plaintiff may recover damages for the detention of the debt, which he cannot do in *scire facias*.⁵ But as a copy of the process must be served in *debt*, if the bail be out of the way, or the plaintiff do not mean to give them notice, he must proceed by *scire facias* on the recognizance.

A *scire facias* against the bail in action, issues out of the court in which the action was depending; and begins by stating the recognizance, after which the judgment is set forth, *prout patet per recordum*: And on a recognizance of bail, taken in an action by *original*, there is no incongruity in stating, that the recognizance was taken in an action "*then lately commenced*, and depending in the King's Bench;" for the action may be said to *commence* in this court, when its jurisdiction attaches upon the original writ sued out of Chancery.⁶ The writ, which is issued on a proper *præcipe*,⁷ then states, that the principal has not paid the debt or damages recovered, nor rendered himself to the prison of the marshal, or warden;⁸ and, in the King's Bench, it concludes, by requiring the sheriff to make known to the bail, that they be before the king at *Westminster*, on a day certain, (by *bill*, or by *original* on a general return day, wheresoever, &c.) to shew if they have or know of any thing to say for themselves, why the plaintiff ought not to have his execution against them, for the debt or damages aforesaid, (by *bill*, or by *original* for the sum acknowledged,) according to the force, form and effect of the recognizance, if it shall seem expedient for him so to do; and further,⁹ &c. In the Common Pleas, the bail are required, by the writ, to be before the king's justices at *Westminster*, on a general return day, to shew, &c. why the penalty of the recognizance

¹ R. E. 15 Geo. II. K. B. *Ante*, 149.
² Cas. Pr. C. P. 18. Imp. C. P. 532.

³ *Ante*, *309.

⁴ *Ante*, 587.

⁵ Stat. 8 & 9 W. III. c. 11. § 3. 3 Bos. & Pul. 14.

⁶ 3 Bur. 1791.

⁷ 14 East, 539.

⁸ Append. Chap. XLIII. § 7.

⁹ 2 Salk. 439. 4 Salk. 320. 2 Ld. Raym.

804. S. C.

^{*} Append. Chap. XLIII. § 8, 9, 11, 12.

should not be made of each of their lands and chattels,^b &c. On a recognizance of bail, the *scire facias* against the principal is *in hac parte*, or that he do and receive what the court shall consider of him in *this* behalf; but against the bail it is *in eâ parte*, or that they do and receive what the court shall consider of them in *that* [*1151] behalf.^c And where a *scire facias* was brought against three persons as bail, upon a recognizance acknowledged by them and the principal jointly, the writ abated; because this being founded on a record, the plaintiff ought to set forth the cause of the variance from the record, as that one was dead:^d But if an action be brought upon a joint bond against three only, when there are four or five obligors, there the defendant ought to shew that it was made by them and others in full life, not named in the writ; for otherwise the court will not intend that the bond was sealed by all of them.^e In *scire facias* to have execution for the damages and costs recovered against I. B. upon a recognizance of bail, conditioned, in case the said I. B. and G. K. should be condemned, that I. B. and G. K. should pay, &c. or render themselves, the plaintiffs allege that I. B. and G. K. have not paid, &c. or rendered themselves, according to the form and effect of the recognizance; the court of King's Bench held, on special demurrer, that the breach was ill assigned: for *non constat* but that I. B., who was alone condemned, has paid or rendered.^f

By the recognizance of bail in *error*, which will be more fully treated of in the next chapter, the plaintiff or plaintiffs in the writ of error become bound, with two sufficient sureties, in double the sum adjudged to be recovered by the former judgment, to prosecute the writ of error with effect, and also to satisfy and pay, if the judgment be affirmed, as well the debt or damages and costs adjudged upon the former judgment, as also all costs and damages to be awarded for the delay of execution.^g Therefore, if the writ of error be non-prossed or discontinued, or the judgment affirmed, the defendant in error may proceed against the bail upon their recognizance, by action of *debt* or *scire facias* at his election: And as a render in this case will not excuse the bail,^h there is no occasion to sue out a *capias ad satisfaciendum*, in order to proceed against them.

The *scire facias* against bail in error should be brought in the same court where the recognizance was taken, unless it was taken in the Common Pleas, and then the *scire facias* may be brought *either in that court, or in the King's Bench, to which the [*1152] record is supposed to be removed.ⁱ This writ is made out by the

^b Append. Chap. XLIII. § 10. 13. And for the form of a *scire facias* against bail in the Exchequer, see *id.* § 14. and against bail in the palace court of *Westminster*, on the removal of a cause under 15l. by *habeas corpus*, into the King's Bench, *id.* § 15.

^c 1 Ld. Raym. 393. 2 Salk. 599. 8. C. but see 1 Ld. Raym. 532. *semb. contra.*

^d Ayleyn, 21.

^e *Id.* 21. And see further, as to the

scire facias against bail to the action, 2 Wms. Saund. 71. c. to 72. c.

^f 4 Maule & Sel. 33. and see 2 Moore, 66. 8 Taunt. 171. S. C.

^g Stat. 3 Jac. I. c. 8. 13 Car. II. stat. 2. c. 2. § 9. 16 & 17 Car. II. c. 8. § 3. 19 Geo. III. c. 70. and see Append. Chap. XLIII. § 16, 17, 18. 57. Chap. XLIV. § 24, &c.

^h R. M. 5 W. & M. (b.) K. B.

ⁱ Lil. Ent. 643. 3 Mod. 251. 1 Wils. 98.

clerk of the errors;^k and, on a recognizance taken in the King's Bench, it recites not only the recognizance, but the condition of it, and the affirmance of the judgment,^l &c. but on a recognizance taken in the Common Pleas, the *scire facias* merely states the recognizance, and the non-payment of the sum acknowledged to be due;^m for in that court, the condition of the recognizance in error is not incorporated, as it is in a recognizance of bail on a *capias ad respondendum*, but is subscribed by way of defeazance; so that the recognizance and condition are two distinct records.ⁿ And besides, if the condition were stated, it would be necessary to state also the affirmance of the judgment, which might occasion difficulty, if the bail were to appear, and plead *nul tiel record* of the judgment of affirmance, which remains in the King's Bench.^o

A *scire facias* upon a judgment is either by or against the *same* or *different* parties. As between the *same* parties, it will be proper to treat of a *scire facias*, in the following cases; first, after a year and a day; secondly, after a writ of *error* brought in the King's Bench, to compel the plaintiff in error to assign errors; thirdly, when judgment is given in *covenant* or *annuity*, or in *debt* on bond conditioned for the payment of an *annuity*, or of money by *instalments*, or for the performance of *covenants*, and damages arise, or money becomes payable, on the same security, after the judgment; and fourthly, when the debt or damages recovered are to be levied out of *future* effects, or, in the case of an executor or administrator, *de bonis propriis*. And first, of the *scire facias* after a year and a day.

At common law, in *real* actions, when land was recovered, the demandant after the year, might have taken out a *scire facias* to revive the judgment; because the judgment being particular *quoad* the land, with a certain description, the law required that the execution of that judgment should be entered upon the roll, that it might be seen, whether execution was delivered of the same thing of which judgment was given: and therefore, if there was no execution appearing on the roll, a *scire facias* issued, to shew cause why [*1153] execution *should not be awarded:^p Besides, in *real* actions, if execution was not sued within the year, a *scire facias* lay for the land; because no other advantage could be taken of the judgment, as an action of *debt* could not be maintained thereon.^q

But if the plaintiff, after he had obtained judgment in a *personal* action, had lain by, and taken no process of execution within the year, he was put to a new original upon his judgment, and no *scire facias* was issuable; because there was not a judgment for any particular thing in the *personal* action, with which the execution could be compared: Therefore, after a reasonable time, which was a year and a day, it was presumed to be executed, and the law al-

^k Barnes, 93.

^l Append. Chap. XLIII. § 17.

^m *Id.* § 16. ⁿ Barnes, 93. 339.

^o See further, as to the *scire facias*

against bail in error, 2 Wms. Saund. 72. c. d.

^p Bac. Abr. tit. *Execution*, H.

^q 3 Salk. 321.

lowed him no *scire facias*, to shew cause why there should not be execution; but if the party had exceeded his time, he was put to his action on the judgment, and the defendant was obliged to shew how the debt, of which the judgment was evidence, was discharged.*

To remedy this, and make the modes of proceeding more uniform in both actions, the statute of Westm. 2. (13 *Edw. I.*) stat. 1. c. 45. gave a *scire facias* to the plaintiff in a personal action to revive the judgment, when he had omitted to sue execution within the year after judgment was obtained.† The words of the act are, “that those things which are found enrolled before them that have the record, or contained in fines, whether they be contracts, covenants, obligations, services or customs, recognizances, or other things whatsoever enrolled, to which the king’s court may lawfully give effect, from henceforth shall have such force, that hereafter it shall not be necessary to implead upon them: But when the plaintiff comes to the king’s court, if the recognizance or fine levied be recent, that is to say, levied within the year, he shall forthwith have a writ of execution of the same recognizance. And if perchance the recognizance were made, or fine levied, of a longer time past, the sheriff shall be commanded, that he make known to the party of whom the complaint is made, that he be before the justices at a certain day, to shew if he has any thing to say, why such matters enrolled, or contained in the fine, ought not to be executed: And if he do not come at the day, or come and can say nothing why execution ought not to be made, the sheriff shall be commanded to cause the thing enrolled, or contained in the fine to be executed.” But notwithstanding this statute, the plaintiff *may still [*1154] proceed, if he think proper, by action of *debt* on the judgment.

It hath been doubted, whether a *scire facias* lay to revive a judgment in *ejectment*, after a year and a day, either by the common law, or by force of the above statute; for at common law, this was looked upon as a personal action, and it was thought that the statute extended only to such personal actions in which debt or damages were recovered, and not to provide a remedy in this case, since at the time of making the act, the possession was not recovered in this action: But it seems now to be settled, and is confirmed by daily practice, that a *scire facias* lies on a judgment in *ejectment*; for the words of the act are, “whether they be contracts, &c. or other things whatsoever enrolled,” which comprehend all judgments, and give the like remedy on them by *scire facias*, as the demandant had on a judgment in a *real* action at common law.‡ In a late case however, where it appeared that the lessor of the plaintiff had neglected to sue out a writ of possession for more than *twenty* years after the recovery in *ejectment*, and in the mean time there

* Bac. Abr. tit. *Execution*, H. but see 2 Salk. 600. 7 Mod. 54. 2 Ld. Raym. 806. S. C.

† Bac. Abr. tit. *Execution*, H.

‡ 1 Salk. 258. 2 Salk. 600. 2 Ld. Raym. 806. S. C. 3 Salk. 319. 1 Ld. Raym. 669. S. C. Bac. Abr. tit. *Execution*, H. The

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scire facias in this case, after judgment against the casual ejector, should go against the tenants, as well as the defendant. 1 Salk. 258. and see Carth. 2. 2 Salk. 600. 1 Ld. Raym. 669. 3 Salk. 319. S. C. Run. Eject. 477, &c. Append. Chap. XLVI. § 44, 5.

had been several changes of the property and possession, the court of King's Bench refused to grant a rule for issuing a *scire facias* to revive the judgment.^u

The reason why the plaintiff is put to his *scire facias* after the year is, because when he lies by so long after judgment, it shall be presumed that he hath released the execution; and therefore the defendant shall not be disturbed, without being called upon, and having an opportunity in court of pleading the release, or shewing cause, if he can, why the execution should not go.^x And it is said, that if the plaintiff delay executing a writ of inquiry till a year after interlocutory judgment, he cannot do it after, without a *scire facias*.^y The year must be computed from the day of signing judgment;^z and the year depending upon the statute 13 Edw. I. c. 45. the words of which are "*infra annum*," is to be reckoned by calendar months, and not by terms.^a And if the plaintiff sue a *scire facias* within a year after the judgment, he cannot afterwards have a *capias* within the year, till he hath a new judgment in the *scire facias*.^b

[*1155] The general rule, however, that the plaintiff cannot take out execution after the year, without a *scire facias*, must be understood with the following restrictions. When a *feri facias* or *capias ad satisfaciendum* is taken out within the year, and not executed, a new writ of execution may be sued out at any time afterwards, without a *scire facias*; provided the first writ be returned and filed,^c and continuances entered from the time of issuing it;^d which continuances may be entered after the issuing of the second writ, unless a rule be made upon motion, for the proceedings to remain *in statu quo*. And formerly, if judgment had been given, and no execution sued out within the year, yet the plaintiff might afterwards have entered an award of an *elegit* on the roll of the judgment, as of the same term with the judgment, and thence continued it down by *vicecomes non misit breve*. And though the court at first inclined to think, that an *elegit* ought to be actually taken out within the year, yet being informed by the clerks of the court, that it had been the practice for many years to make such an entry, &c. it was said to be the law of the court, and they ordered the execution to stand.^e But in a late case,^f the court of King's Bench was of opinion, that there was no reason to distinguish between an *elegit* and other executions: and therefore, where an *elegit* had been issued after a year, without a *scire facias*, or any previous writ sued out within the year, to warrant it, the court set it aside for irregularity; although the award of

^u 2 Barn. & Ald. 773. 1 Chit. Rep. 535.

S. C.

^x 2 Inst. 470.

^y 12 Mod. 500. *Sed. quære*, whether a term's notice is not in this case sufficient? *Ante*, 625. R. M. 1654. § 21. (c.) C. P. and see 6 Moore, 517.

^z Barnes, 197.

^a 1 Str. 301. and see 6 Mod. 14. 1 Chit. Rep. 669. (a.)

^b 1 Rol. Abr. 900.

^c 2 Wils. 82. Barnes, 213. S. C.

^d Co. Lit. 290. b. 2 Inst. 471. 2 Leon.

^e 77, 8. 1 Sid. 59. 1 Keb. 159. S. C. Carth. 283. Comb. 232. S. C. 3 Salk. 321. 1 Str. 100.

^f Carth. 283. Comb. 232. S. C.

^g *Pitland v. Pitland & another*, E. 57 Geo. III. K. B. 2 Chit. Rep. 384. S. C.

an *elegit* had been entered on the roll, with continuances, after the rule was moved for.

If the plaintiff have judgment with a *cesset executio*, or stay of execution, for a year, he may, after the year, take out execution without a *scire facias*;⁵ because the delay is by consent of parties, and in favour of the defendant; and the indulgence of the plaintiff ought not to be turned to his prejudice: But if the plaintiff do not take out execution within a year after the *cesset executio* is determined, he must sue out a *scire facias*.⁶ It is usual to insert a clause in annuity deeds, &c. that when execution is not taken out within a year, it shall not be necessary to revive the judgment by *scire facias*; and it seems that the court will give effect to this clause, by permitting execution to be taken out accordingly.¹

*So, if the defendant bring a writ of error, and thereby [*1156] hinder the plaintiff from taking out execution within the year, and the judgment be affirmed, the plaintiff in error nonsuited, or the writ of error abated or discontinued, the defendant in error may proceed to execution after the year, without a *scire facias*;² because the writ of error was a *supersedeas* to the execution, and the defendant in error must wait till it be determined. It has even been holden, in one case,¹ that if a writ of error be brought after the year is elapsed, and thereupon the former judgment is affirmed, such affirmance will revive the former judgment, and enable the party to take out execution, without a *scire facias*: But from this case it seems, that if the plaintiff in error be nonsuited, or the writ of error discontinued, there can be no execution of the former judgment, without a *scire facias*.

It was formerly holden, that if the plaintiff were restrained by *injunction* out of Chancery for a year, he could not take out execution afterwards, without a *scire facias*;³ because the courts of law do not take notice of Chancery injunctions,⁴ as they do of writs of error: besides, it might be no breach of the injunction, to take out execution within the year, and continue it down by *vicecomes non misit breve*, which cannot be done in the case of a writ of error. But in a modern case,⁵ where it appeared that the whole delay had arisen on the part of the defendant, by bills in Chancery for injunctions, and by obtaining time for payment, &c. the court of King's Bench were unanimous that this rule, of reviving a judgment above a year old by *scire facias* before execution, which was intended to prevent a surprise upon the defendant, ought not to be taken advantage of by one, who was so far from being surprised by the delay, that he himself had been trying all manner of methods, whereby he might delay the plaintiff; and therefore they discharged the rule for setting aside the execution with costs.

The *scire facias* upon a judgment must be sued out of the same

⁵ 6 Mod. 288. 1 Salk. 322. S. C.

⁶ 2 Crompt. 102.

¹ 2 Smith R. 66. 2 Lee's Prac. Dic. 1073. 2 Barn. & Cres. 242.

² 2 Inst. 471. 5 Co. 88. Cro. Eliz. 416. Carth. 237. 6 Mod. 288. 1 Salk. 322. S. C.

3 Salk. 321.

⁴ 1 Rol. Rep. 104. Cro. Jac. 364. S. C.

⁵ 6 Mod. 288. 1 Salk. 322. S. C. 1 Str. 301. S. P.

⁶ 1 Salk. 257.

⁷ 2 Bur. 660. and see 6 Moore, 517.

court where the judgment was given, if the record remains there;^p or if it has been removed, out of the court where the record is. If the judgment be under *seven* years old, the plaintiff may, in either court, sue out a *scire facias*, as a matter of course, on a proper *præcipe*,^q without any rule or motion: If it be above *seven* years, but under *ten*, he cannot have a *scire facias*, without a side-[*1157] bar or treasury *rule.^r Formerly, if the judgment had been above *ten* years old, there must have been a motion to the court, in the King's Bench,^s supported by an affidavit of the debt being due, the judgment unsatisfied, and the defendant living;^t upon which the rule was absolute in the first instance, unless the judgment were of more than *twenty* years standing, and then there must have been a rule to shew cause. But now, if the judgment be above *ten* and under *fifteen* years old, the rule is absolute in the first instance, on an affidavit of the debt being due, &c.; and may be drawn up on a motion paper signed by counsel: If it be above *fifteen* years old, there must be a rule to shew cause.^u In the Common Pleas, where the judgment is more than *ten* years old, the court must be moved in term time, for leave to issue a *scire facias* to revive it; and will order that no execution be taken out thereon, without a return of *scire feci*, or an affidavit of personal notice to the defendant:^v Therefore, where a writ of *scire facias* was issued more than *ten* years after the judgment, on a motion paper signed by a serjeant in vacation, and the defendant had no personal notice of the proceeding, the court set aside the judgment signed thereon for irregularity:^w And if the judgment be above *twenty* years old, there must be a rule to shew cause.^x

A *scire facias* upon a judgment, after a year and a day, states the judgment recovered by the plaintiff; which differs according to the nature of the action, and the court in which it was obtained: And when a *scire facias* is brought on a judgment in the King's Bench, the plaintiff must shew where the court of King's Bench was holden, because that court is ambulatory: But if it be brought upon a judgment in the Common Pleas, it is otherwise; because that court is confined to a certain place.^a It then states, that although judgment be thereupon given, yet execution of the debt or damages still remains to be made; and commands the sheriff, to make known to the defendant, that he be in court at the return-day, to shew why the plaintiff ought not to have execution against him for the debt or damages, according to the form and effect of the recovery, &c.^b This being a judicial writ, must pursue the nature of the judgment: [*1158] therefore, if a joint judgment be obtained against two, the

^p Com. Dig. tit. *Pleader*, 3 L. 3.

^q Append. Chap. XLIII. § 60.

^r 2 Salk. 598. Sty. P. R. 575. Ed. 1707. *Ante*, 490. Append. Chap. XLIII. § 58.

^s *Id. ibid.* 2 Lil. P. R. 498. Ed. 1719. 1 *Inst. Cler.* 152.

^t Imp. K. B. 519. 2 Sel. Pr. 286.

^u Imp. K. B. 512. *Blakely v. Vincent*, T. 35 Geo. III. *Waters v. Hales*, E. 37 Geo. III. K. B. 2 Barn. & Ald. 773. 1

Chit. Rep. 635. S. C. 1 Dowl. & Ry. 181. *Ante*, 491, 2. 492. (g.) 493.

^x 2 Blac. Rep. 1140. Append. Chap. XLIII. § 59.

^y 3 Moore, 757. 1 Brod. & Bing. 381. S. C.

^z 2 Sel. Pr. 286. and see 2 Blac. Rep. 995.

^a 3 Salk. 321.

^b Append. Chap. XLIII. § 61, &c.

scire facias must be against both.* And in setting out the judgment, if there be a material variance, it will be fatal, on *nul tiel record*.

When a *scire facias* is brought in the King's Bench, upon a judgment of an inferior court, it must appear in the writ itself, how the judgment came into the King's Bench, whether by *certiorari* or by writ of error, because the execution is different;^d for if it came by *certiorari*, the *scire facias*, we have seen,^e ought to shew the particular limits of the inferior jurisdiction, and pray execution within those limits: But if the judgment be removed into the King's Bench by writ of error, and affirmed, the party may have execution in any part of England; for by the affirmance, it is become the judgment of the King's Bench.^f

After the judgment has been once revived by *scire facias*, if the plaintiff do not take out execution within a year,^g or the defendant die before execution,^h the plaintiff cannot afterwards take it out, without a new *scire facias*, or action on the judgment; but he may have a new writ without motion, for the judgment was revived before.ⁱ

Secondly: As the parties, in the King's Bench, have no day in court given to either of them, on the removal of the record by writ of error, the defendant in error hath no other way of compelling the plaintiff to assign his errors, than by suing out a writ of *scire facias quare executionem non*, &c.;^k and if upon such writ, the plaintiff in error do not assign errors, but suffer judgment to pass by default upon *scire feci*, or two *nilis*, no errors afterwards assigned shall prevent execution.^l This writ, and the proceedings thereon, will be more fully treated of in the next chapter.^m

Thirdly: With respect to demands arising after the judgment, it is said to have been adjudged, that in covenants perpetual, as to repair, &c. if they be once broken, and an action of *covenant* brought, and a recovery had thereon, if they be afterwards broken, the plaintiff *shall have a *scire facias* upon the judgment, and need not [*1159] bring a new writ of covenant.ⁿ

Upon a writ of *annuity*, the old books differ as to the necessity of a *scire facias*, in order to have execution for subsequent arrears. In some books it is said, that if judgment be given in a writ of *annuity*, the plaintiff shall have execution, within a year after every day of payment, by *fieri facias* or *elegit*, though it be many years after the judgment;^o but other books seem to hold a different doctrine, and that for arrearages incurred after the judgment, it is

* 2 Salk. 698. Carth. 105. S. C.

^d 3 Salk. 320. 1 Ld. Raym. 216. S. C. but see the statutes 19 Geo. III. c. 70. and 33 Geo. III. c. 68. *Ante*, *402. 1032.

^e *Ante*, *402.

^f Append. Chap. XLIII. § 77, &c. 1 Ld. Raym. 216. 3 Salk. 320. S. C. and see 3 Durnf. & East, 657.

^g 2 Cromp. 103.

^h 2 Salk. 598.

ⁱ *Id. ibid.* And see further, as to the *scire facias* on a judgment, after a year

and a day, 2 Wms. Saund. 6. (1). *e. f. g.*

^k Godb. 68. 2 Leon. 107. Append. Chap. XLIII. § 75, 6.

^l Carth. 40, 41.

^m For the form of a *scire facias* to disprove a debt, in the mayor's court of London, after judgment and execution on a foreign attachment, see Append. Chap. XLIII. § 80.

ⁿ Cro. Eliz. 3. but see 3 Leon. 51.

^o 21 Edw. III. 22. 2 Inst. 471. 1 Rol. Abr. 900. 2 Blac. Rep. 844.

necessary to have a *scire facias*, in order that the defendant may have an opportunity of pleading payment, or rather matter in bar of execution:^p And this latter opinion is in some measure confirmed by the language of the judgment, which is to recover the annuity, and arrearages of the same, as well before the bringing of the action as afterwards, up to the time when judgment is given;^q but the amount of the arrearages subsequent to the judgment not being ascertained, it seems to be necessary to have a *scire facias*, to warrant an execution.

In an action of *debt* on bond, conditioned for the payment of an *annuity*, after judgment had been once obtained, it does not seem to have been formerly necessary to have a *scire facias*, to warrant an execution for subsequent arrears; but an execution might have been sued out for such arrears, without a *scire facias*, at any time within a year after they were incurred; or even afterwards, if a writ of execution had been previously taken out and returned, and was properly continued down.^r Under such an execution, however, the plaintiff was not allowed to levy the whole penalty, but only the arrears; and therefore, where he levied the whole penalty, the court of Common Pleas made a rule upon him to refund the overplus, beyond what would satisfy the arrears, and that judgment should stand as a security, with liberty to take out execution as future arrears should arise.^s And if judgment be entered up for the *penalty* of a bond, given to secure an annuity, and the defendant taken in execution thereon, when the warrant of attorney, under which such judgment was entered up, only authorized the taking out execution for the *arrears*, the court, we have seen,^t will set aside the execution *in* [1160] *toto*, and not merely charge ^uthe defendant *pro tanto*.^v So, in an action of *debt* on bond, conditioned for the payment of money by *instalments*, where the proceedings were stayed on payment of one or more of the instalments, and judgment entered as a security for the remainder, with a stay of execution till they should become due, it does not seem to have been formerly necessary for the plaintiff to sue out a *scire facias*, for the recovery of subsequent instalments, if execution was taken out within a year after each default.^w But now, as a bond conditioned for the payment of an *annuity*, or of money by *instalments*, is holden to be within the statute 8 & 9 W. III. c. 11. § 8.^x it seems necessary to proceed by *scire facias* on that statute, for subsequent arrears, or instalments;^y unless judgment be entered up on a warrant of attorney, which is not within the statute.^z

When judgment is entered in an action of *debt* on bond, or on any penal sum, for non-performance of *covenants* or agreements in

^p 11 Hen. IV. 34. Bro. Abr. tit. *Annuity*, pl. 17. tit. *Scire facias*, pl. 75. Co. Lit. 145. 2 Co. 37. 6 Co. 45. Jenk. 51, 2. 1 Rol. Abr. 229. 1 Salk. 258. 2 Salk. 600.

^q Co. Ent. 50. Cro. Car. 436. *Ante*, 963.

^r 2 Blac. Rep. 843. and see 1 H. Blac. 297.

^s 2 Blac. Rep. 1111.

^t *Ante*, 1035.

^u 16 East, 163.

^v 2 Str. 814. 957. 2 Blac. Rep. 706. 958. Barnes, 288. *Ante*, 588, 9. 2 Wms. Saund. 72. *g.*

^w *Ante*, 633.

^x Append. Chap. XLIII. § 81. 83.

^y *Ante*, 633.

any indenture, deed or writing contained, we may remember,^b that by the statute 8 & 9 W. III. c. 11. § 8. it remains as a security to answer such damages as shall or may be sustained, for further breach of any covenant or covenants in the same indenture, deed or writing contained: and the statute further directs, that "the plaintiff may have a *scire facias* upon the said judgment against the defendant, or against his heir, tenants, executors or administrators, suggesting other breaches of the said covenants or agreements, and to summon him or them respectively to show cause, why execution should not be had or awarded upon the said judgment;" upon which there shall be the like proceeding, as in the action of *debt* upon the said bond or obligation, for assessing damages upon trial of issues joined upon such breaches, or inquiry thereof upon a writ to be awarded in manner as therein directed; and that upon payment or satisfaction of such future damages, costs and charges, all further proceedings on the said judgment are again to be stayed, and so *toties quoties*, and the defendant, his body, lands or goods, shall be discharged out of execution."

Fourthly: With regard to *future* effects, it is enacted by the statute 5 Geo. II. c. 30. § 9. that "in case any commission of *bankruptcy* shall issue against any person or persons, who shall have been discharged by virtue of that act, or shall have compounded with his her or their creditors, or delivered to them his her or their *estate or effects, and been released by them, or been dis- [*1161] charged by any act for the relief of insolvent debtors, then and in either of those cases, the body and bodies only of such person and persons, conforming as therein mentioned, shall be free from arrest and imprisonment, by virtue of that act; but the *future* estate and effects of every such person and persons shall remain liable to his her or their creditors, as before the making of that act: (the tools of trade, necessary household goods and furniture, and necessary wearing apparel of such bankrupt, and his wife and children, only excepted,) unless the estate of such person or persons, against whom such commission shall be awarded, shall produce, clear after all charges, sufficient to pay every creditor under the said commission, *fifteen* shillings in the pound for their respective debts." And there is a similar provision in the statute 49 Geo. III. c. 121.^d with respect to an assignee becoming bankrupt, who shall, at the time of the commission issuing against him, be indebted to the estate of the bankrupt, of which he was assignee, to the amount of 100*l.* or upwards, in respect of money come to his hands as such assignee, and wilfully retained or employed by him for his own benefit. Upon the former of these statutes it has been holden, that though a prior commission be superseded by consent, a second bankruptcy does not protect future effects, unless *fifteen* shillings in the pound are paid under the second commission:^e And a deed of composition embracing *all* the creditors, under which many of them came in, is, in case of a subsequent commission of bankruptcy, such a compounding with

^b *Ante*, 632. and see 2 Wms. Saund.
72. g.

^c Append. Chap. XLIII. § 82.
^d § 6.

^e Doug. 46.

his creditors, as will, within the statute 5 Geo. II. c. 30. § 9. deprive the bankrupt of the benefit of his certificate, to protect his future effects from being liable to be taken in execution, although some of the creditors did not come in under the deed of composition.⁴ But a deed of composition framed only for the *joint* creditors of several persons, one of whom afterwards becomes bankrupt, is not such a compounding with his creditors, as will avoid the effect of his certificate, or subject his future effects to be taken in execution: the compositions which the statute contemplates, being not such as are limited and extend to a particular class or description of creditors, only, but such as are general, and calculated to admit all creditors, of whatever description they may be.⁵ And the proving of a debt under a commission of bankruptcy issued against a person who had before compounded with his creditors, and whose estate under the commission had not produced, nor would produce, *fifteen* shillings [*1162] in *the* pound, but who, before he became bankrupt, paid the creditors with whom he compounded, the full amount of their debts, was held to discharge the bankrupt, in respect of his future estate and effects, from an action for the debt so proved.⁶

When the defendant pleads his bankruptcy, and the plaintiff relies on the defendant having been a bankrupt before, it is sufficient proof of the first bankruptcy, to produce the proceedings, and to show that the defendant submitted to that commission, without proving the trading, petitioning creditor's debt, and act of bankruptcy.¹ To prove that the defendant, who pleads his bankruptcy, had before been discharged as a bankrupt, the plaintiff must show that the defendant obtained his certificate under the former commission, either by the regular proof of it, or by secondary evidence, after a notice to produce it: Without such notice, the defendant's affidavit of conformity under the former commission, was holden insufficient.² And the book kept in the office of the secretary of bankrupts, in which entries are made of the allowance of certificates, is not secondary evidence.³ But after notice to produce the former certificate, it is enough if witnesses state they were employed by the defendant to solicit that certificate; and that looking at the entries in their books, they have no doubt it was allowed by the Lord Chancellor.¹ And the certificate under a second commission is no bar to an execution against the bankrupt's effects, unless it appear affirmatively, that his estate had produced, clear after all charges, sufficient to pay every creditor under the commission *fifteen* shillings in the pound, for their respective debts: Evidence that it will probably produce so much, is not sufficient.⁴

The *judgment* against a *bankrupt*, under the above circumstances, is *general*, if given before he has obtained his certificate under the second commission; or if given afterwards, it may be *special*, against his future estate and effects, with the exceptions in the statute.

¹ 1 Maule & Sel. 182.

² 15 East, 619.

³ 3 Maule & Sel. 78. and see 2 Chit. Rep. 114. *Ante*, 1049.

⁴ 3 Esp. Rep. 195.

⁵ 4 Campb. 282.

⁶ 13 Campb. 499.

¹ 16 East, 225. and see 5 Durnf. &

East, 287. 1 Bos. & Pul. 467. 3 Esp. Rep. 195. *Kingsford v. Tracey*, H. 43 Geo. III. K. B.

On a general judgment, the plaintiff, it seems, cannot sue out a special execution against the future effects of the bankrupt; such an execution not being warranted by the judgment.^a But where the defendant, having given a warrant of attorney to confess a judgment, took the benefit of an insolvent act, and then became bankrupt and obtained his certificate, after which the plaintiff entered up a *general* judgment, and sued out a *general* execution against his effects; the court of Common Pleas held the proceedings to be regular, and that no *scire facias* was necessary to authorize either the [*1169] judgment or execution; no dividend appearing to have been made, nor any goods taken under the execution more than the plaintiff was entitled to.^b

When a writ of *scire facias* is necessary, as where the judgment has been given more than a year, and the defendant in the mean time has been taken in execution, and discharged upon obtaining his certificate, the *scire facias* should state the judgment, and the circumstances which make the defendant's future estate and effects liable to satisfy it, as that he was before a bankrupt, or had compounded with his creditors, &c.; and in particular it is necessary to aver, that the bankrupt's estate had not paid *fifteen* shillings in the pound under the second commission, at the time of suing out the writ: It then states, that the defendant has become seised or possessed of some estate or effects; and commands the sheriff, that he make known to the defendant, to appear in court at the return day, to shew why the plaintiff should not have execution of the debt or damages, to be levied of the estate and effects whereof the defendant hath become seised or possessed, since the obtaining of his certificate under the last commission, except his tools, &c.^c

By the *Lords'* act; (32 Geo. II. c. 28. § 17. 20.) we may remember,^d that "notwithstanding any discharge obtained by virtue of that act, for the person of any prisoner, the judgment obtained against every such prisoner shall continue and remain in force, and execution may at any time be taken out thereon, against the lands, tenements, rents or hereditaments, goods or chattels of any such prisoner, other than and except the necessary wearing apparel and bedding for himself and family, and the necessary tools for the use of his trade or occupation, not exceeding 10*l.* in value in the whole, as if he had never been before arrested, taken in execution, and released out of prison." There is also a similar provision in the statute 48 Geo. III. c. 123. for the discharge of debtors in execution for small debts. And it has been determined, that the effects acquired by an *insolvent*, after his discharge under the 34 Geo. III. c. 69. are liable to be taken in execution for a debt due before.^e But an execution sued out against the goods of a defendant was set aside, and the money which had been levied under it ordered to be

^a 1 Durnf. & East, 80.

^b 3 Bos. & Pul. 185. and see 2 Chit. Rep. 114.

^c Append. Chap. XLIII. § 86, 7. and see 2 Wms. Saund. 72. g. h.

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^d *Ante*, 393.

^e 6 Durnf. & East, 366. and see 8 East, 55. Stat. 44 Geo. III. c. 108. § 63. 51 Geo. III. c. 125. § 60. 54 Geo. III. c. 28. § 99. *Ante*, 393.

restored; the defendant having been discharged, pending the action, under the insolvent act, 1 Geo. IV. c. 119.*

[*1164] On a *general* judgment, obtained against a defendant before his discharge under an insolvent act, no special execution can be taken out, without first suing out a *scire facias*.^c And where a warrant of attorney was given before the passing of an insolvent act, of which the defendant was entitled to take advantage by pleading in discharge of his person, &c. it was holden, that a *general* judgment signed by virtue of such warrant of attorney, after the defendant's discharge, would not warrant a *special* execution under the act.^d But it seems that in this case, a *general* execution, pursuing the judgment, would be regular; and that a *scire facias* is unnecessary.^e

In the case of an *executor* or *administrator*, the judgment against him is either upon the plaintiff's confession of the plea of *plene administravit* or *plene administravit præter*, for the debt or damages and costs, to be levied, as to the whole or in part, of the goods of the testator or intestate, which shall afterwards come to the hands of the defendant to be administered; which is called a judgment of assets *quando acciderint*: or it is after a verdict, demurrer, or issue of *nul tiel record*, or by confession of the defendant, or *nihil dicit*, for the debt or damages and costs, to be levied of the goods of the testator or intestate, in the hands of the defendant, if he hath so much thereof in his hands to be administered, and if not, then the costs to be levied of his own proper goods.^f

In the first case, the judgment appears to be founded on the opinion of the court in *Mary Shipley's* case,^g where it was holden, that upon a plea of *plene administravit*, the plaintiff may have judgment for his debt presently, for thereby the defendant confesses the debt; but he cannot have execution, until the defendant have goods of the deceased, when he may either sue out a *scire facias*,^h or bring an action of *debt* upon the judgment, suggesting a *devastavit*: And though this opinion was questioned in the case of *Dorchester v. Webb*,ⁱ yet in a subsequent case^j it was established, and has ever since been adhered to. So, in *debt* against an heir, if he plead *nothing by descent*, the plaintiff may have judgment presently, and a *scire facias* when assets descend.^k But by taking judgment of assets *quando acciderint*, the plaintiff admits that the [*1165] defendant has fully administered *to that time; and therefore on a *scire facias*, or action of *debt* on the judgment, suggesting a *devastavit*, the court will not allow the plaintiff to give any evidence of effects come to the defendant's hands before the judgment.^l And for the same reason, the *scire facias* on a judgment of assets

* 8 Price, 607.

^c 1 Durnf. & East, 79. Append. Chap. XLIII. § 88.

^d 1 Durnf. & East, 80. and see 2 Wms. Saund. 72. h. i.

^e Per Cur. H. 41 Geo. III. K. B. 3 Bos. & Pul. 185. C. P.

^f 4 Durnf. & East, 648. 7 Durnf. & East, 359.

^g 8 Co. 134.

^h Append. Chap. XLIII. § 85.

ⁱ Cro. Car. 372.

^j *Nelson v. Noel* and others, 2 Saund. 226. 1 Sid. 448. 1 Lev. 286. 1 Vent. 94, 5. 2 Keb. 606. 621. 631. 666. 671. S. C. Hob. 199. S. P. and see 7 Durnf. & East, 29.

^k 8 Co. 134.

^l Bul. Ni. Pri. 169.

quando acciderint, must only pray execution of such assets as have come to the defendant's hands since the former judgment; and if it pray execution of assets generally, it cannot be supported.^f Where, upon a suggestion of assets, a *scire facias* was taken out, and assets were found for part, judgment was given to recover so much immediately, and the residue of assets *in futuro*.^g

In proceeding upon a judgment against an executor or administrator, after verdict, &c. it is usual for the plaintiff to sue out a *fiert facias de bonis testatoris, si, &c. et si non, de bonis propriis*, according to the judgment;^a upon which the sheriff, if he cannot execute the writ according to its tenor, either returns *nulla bona* generally, or *nulla bona* and a *devastavit* by the defendant.ⁱ On the latter return, the plaintiff, we have seen,^k may have execution immediately against the defendant, by *capias ad satisfaciendum*, or *fiert facias de bonis propriis*: But on the former, the ancient course was to issue a special writ, for the sheriff to inquire whether the defendant had wasted any of the goods of the deceased:^l And if a *devastavit* were found, and returned by the sheriff, a *scire facias* issued for the defendant to shew cause, why the plaintiff should not have execution *de bonis propriis*: to which *scire facias* the defendant might appear, and plead *plene administravit*.^m But now, for the sake of expedition, the inquiry and *scire facias* are made out in one writ, which is called a *scire fieri* inquiry; reciting the judgment, *fiert facias*, and return of *nulla bona*, and after suggesting a *devastavit*, commanding the sheriff to cause the debt or damages and costs to be made of the goods of the testator or intestate, if &c.; and if not, then, if it shall appear by inquisition,ⁿ that the defendant hath wasted the goods of the deceased, to give notice to the defendant, to appear in court at the return of the writ, to shew cause why the plaintiff ought not to have execution *de bonis propriis*.^o *And there must be the same notice of executing [*1166] such writ, as of a common writ of inquiry.^p This method however, though preferable to the old one, is seldom pursued at this day; as the plaintiff is not allowed any costs, unless the defendant appear and plead, or there be a joinder in demurrer: and therefore it is more usual, on the return of *nulla bona* to the *fiert facias*, to bring an action of *debt* on the judgment, suggesting a *devastavit*.

The *scire facias*, upon a change of parties, is governed by the rule laid down in the case of *Penoyer v. Brace*,^q that where a new person is to be benefited or charged by the execution of a judgment, there ought to be a *scire facias*, to make him party to the judgment: but

^f 6 Durnf. & East, 1. and see 2 Wms. Saund. 219. (2.)

^g *Perryman & Westwood*, cited in 1 Vent. 95. & 1 Sid. 448.

^h Cro. Eliz. 887.

ⁱ *Thes. Brev.* 116. 17. ^k *Ante*, 1064.

^l Cro. Eliz. 859. 887.

^m *Id.* Lil. Ent. 667.

ⁿ Append. Chap. XLIII. § 119.

^o *Thes. Brev.* 236, &c. Lil. Ent. 666. Append. Chap. XLIII. § 84. And for the return to a *scire fieri* inquiry, see Append. Chap. XLIII. § 118.

^p Gilb. Cas. 95. 1 Str. 235. 623. 2 Ld. Raym. 1382. 8 Mod. 366. S. C. Cas. Pr. C. P. 1.

^q 1 Ld. Raym. 245. 1 Salk. 319. 20. S. C. and see 2 Inst. 471. 2 Ld. Raym. 768.

where the execution is not beneficial or chargeable to a person who was not party to the judgment, a *scire facias* is unnecessary. On this rule depend the cases of *marriage*, *bankruptcy*, and *death*: and first, of *marriage*.

If a *feme sole* obtain judgment, and she afterwards marry before execution, there must be a *scire facias* for husband and wife, in order to execute the judgment. And in a modern case^r it was holden, that the husband cannot have execution for the costs, on a plea of coverture found for his wife, sued as a *feme sole*, without a *scire facias*; it being a maxim, that a person not a party to the record, cannot be benefited or charged with the process, without a *scire facias*. So, if final judgment be given against a *feme sole*, and she marry before execution, there should regularly be a *scire facias* to revive it against her and her husband. But when a *feme sole* marries, after interlocutory judgment against her upon a contract, the plaintiff may proceed to judgment and execution, without joining the husband by *scire facias*; and a *capias ad satisfaciendum*, following the judgment, is at all events regular, though the plaintiff had notice of the marriage before.^s So, in *ejectment* against a *feme sole*, who married before trial, and afterwards verdict and judgment were given against her by her original name; the court of King's Bench held, that it was regular to issue an *habere facias possessionem* and *feri facias* against her by the same name, though the *feri facias* was inoperative.^t In a *scire facias* by baron and [*1167] *feme*, upon a *judgment recovered by the *feme dum sola*, the plaintiffs should state their marriage;^u but they need not allege it with a venue, this being only matter of surmise, to which no venue is necessary.^v

If husband and wife obtain judgment, for the proper debt of the wife, and afterwards the wife die before execution, the husband alone may have a *scire facias*, without taking out administration;^w for by the judgment, the nature of the debt is altered, and it is become a debt to the husband.^x So, if execution be awarded to the husband and wife, on a judgment obtained by the wife *dum sola*, for her own proper debt, the husband alone may have a *scire facias* after his wife's death;^y for though the award of execution does not alter the nature of the debt, yet it alters the property, and vests it in the husband jointly with his wife. And, in like manner, if judgment be obtained against a *feme sole*, and she marry, and then the plaintiff sue out a *scire facias* against husband and wife,^b and have judgment *quod habeat executionem* against both, and afterwards the wife die, the plaintiff may sue out a *scire facias*, and have execution against the husband.^c But if husband and wife obtain judgment for a debt due to the wife as executrix, and then the wife die before execution,

^r Doug. 637.

^s 4 East, 521.

^t 3 Maule & Sel. 557.

^u Append. Chap. XLIII. § 89. 91.

^v 2 Str. 775. 2 Ld. Raym. 1504. 1 Barnard. K. B. 16. S. C. and see 2 H. Blac. 145. 7 Durnf. & East, 243.

^w Cro. Eliz. 844. 1 Sid. 337. 1 Mod. 179.

^x But see 3 Atk. 21.

^y 1 Salk. 116. Carth. 415. Comb. 455.

Skin. 682. S. C.

^b Append. Chap. XLIII. § 90.

^c 3 Mod. 186. Carth. 30. Comb. 103. S. C.

the husband cannot have a *scire facias* upon the judgment;^d for though he was privy to the judgment, he shall not have the thing recovered, but it belongs to the succeeding executor or administrator.^e

Secondly, of *bankruptcy*: Whenever the defendant has a day in court to plead it, he may plead the bankruptcy of the plaintiff, and the assignment of his effects, in bar to his recovery, or to his having execution on a recognizance of bail, &c.^f But if the plaintiff become bankrupt, after interlocutory and before final judgment,^g or after final judgment and pending a writ of error,^h his assignees may proceed to final judgment, or affirmance, in the bankrupt's name. And where the plaintiff became bankrupt after judgment, and a writ of error allowed, it was determined that his assignees could not sue out a *scire facias* in their own names, to compel an assignment of errors; but must go on with the writ of error in the bankrupt's name, till judgment.ⁱ It was formerly holden, that if the plaintiff became bankrupt after final judgment or affirmance, and before execution, the assignees must have sued out a *scire facias*:^k And a *scire* [*1168] *facias* by the assignees of a bankrupt, stating that he became bankrupt, within the true intent and meaning of the statutes, &c. and that his effects were afterwards in due manner assigned to the plaintiffs, was deemed sufficiently certain; without alleging the particular requisites necessary to support a commission, or that the party was declared a bankrupt, or his effects assigned by deed, and without making a *profert in curia* of the deed of assignment.^l But where the plaintiff became bankrupt, after he had revived the judgment by *scire facias*, the court of King's Bench ordered the special matter to be entered, to entitle his assignee to the benefit of the judgment on the *scire facias*, without bringing a new *scire facias*:^m And, in a late case,ⁿ where the plaintiff became bankrupt between interlocutory and final judgment, and sued out execution in his own name, the court refused to set aside the proceedings.^o

Thirdly, of *death*; which may be considered either as it happens before, or after final judgment. At common law, the death of a sole plaintiff or defendant, at any time before *final* judgment, would have abated the suit. But now, by the statute 17 Car. II. c. 8. for the avoiding of unnecessary suits and delays, it is enacted, that "in all actions personal, real or mixed, the death of either party, *between the verdict and the judgment*, shall not be alleged for error; so as such judgment be entered within *two* terms after the verdict." This statute is confined to *verdicts*; and does not extend to cases where either party dies after interlocutory judgment, and before the

^d Cro. Car. 208. 227. W. Jon. 248. S. C.

^e See further, as to the *scire facias* on marriage, 2 Wms. Saund. 72. k. l.

^f 15 East, 622.

^g 2 Wils. 372.

^h 1 Durnf. & East, 463. 2 Durnf. & East, 45.

ⁱ 1 Durnf. & East, 463.

^k 1 Mod. 93. 1 Vent. 193. S. C. and see

2 Wils. 372. 378. 2 Durnf. & East, 45. where a *scire facias* issued, upon a bankruptcy happening between interlocutory and final judgment.

^l 2 Durnf. & East, 45. and see Append. Chap. XLIII. § 92.

^m 5 Mod. 88.

ⁿ 3 Durnf. & East, 437.

^o See further, as to the *scire facias* on bankruptcy, 2 Saund. 72. l. m.

return of the inquiry.^p The judgment upon this statute is entered for or against the party, as though he were alive;^q and it should be entered, or at least signed,^r within *two* terms after the verdict. But there must be a *scire facias* to revive it, before execution:^s and such *scire facias*, pursuing the form of the judgment, should be general,^t as on a judgment recovered by or against the party himself.

By a subsequent statute,^u it is enacted, that "in all actions to be commenced in any court of record, if the plaintiff or defendant happen to die, *after interlocutory and before final judgment*, the action shall not abate by reason thereof, if such action might have [*1169] been originally prosecuted or maintained by or against the executors or administrators of the party dying; but the plaintiff, or, if he be dead after such interlocutory judgment, his executors or administrators, shall and may have a *scire facias* against the defendant, if living after such interlocutory judgment, or if he died after, then against his executors or administrators, to shew cause why damages in such action should not be assessed and recovered by him or them.^v And if such defendant, his executors or administrators, shall appear at the return of such writ, and not shew or allege any matter sufficient to arrest the final judgment, or being returned warned, or upon two writs of *scire facias*, it be returned that the defendant, his executors or administrators, had nothing whereby to be summoned, or could not be found in the county, shall make default, that thereupon a writ of inquiry of damages shall be awarded; which being executed and returned, judgment final shall be given for the said plaintiff, his executors or administrators, prosecuting such writ or writs of *scire facias*, against such defendant, his executors or administrators, respectively."^w This statute has been holden not to extend to cases where the party dies before interlocutory judgment, though it be after the expiration of the rule to plead.^x And where the plaintiff brought an action against two defendants, and proceeded to outlawry against one, and went on with the action against the other, who died after interlocutory and before final judgment, the court of King's Bench held, that he could not have a *scire facias* against his administrator; for, notwithstanding the outlawry, the action remained joint, and therefore survived against the other defendant.^y It should also be remembered, that the statute is expressly confined to cases where the action might originally have been prosecuted or maintained by or against the executors or administrators of the party dying; and therefore, where the plaintiff in an action for a *libel*, died after interlocutory judgment signed and writ of inquiry executed, but before the day in bank, the court of Common Pleas held, that final judgment could not be entered for the plaintiff, for the damages assessed, the suit having abated by his death.^b

^p 4 Taunt. 884.

^q 1 Salk. 42.

^r 1 Sid. 385. Barnes, 261.

^s 1 Wils. 302.

^t 2 Ld. Raym. 1280. Append. Chap. XLIII. § 103.

^u 8 & 9 W. III. c. 11. § 6.

^v Append. Chap. XLIII. § 93, &c.

^w *Id.* § 129.

^x 1 Wils. 315. but see Barnes, 266.

^y 1 Maule & Sel. 242.

^b 4 Taunt. 884.

When either party dies after interlocutory judgment, and before the execution of the writ of inquiry, the *scire facias* upon this statute ought to be for the defendant, or his executors or administrators, *to show cause why the damages should not be assessed, [*1170] and recovered against them; and to hear the judgment of the court thereupon.^d But when the death happens after the writ of inquiry is executed, and before final judgment, the *scire facias* must be to show cause why the damages assessed by the jury should not be *adjudged* to the plaintiff, or his executors or administrators.^e

The judgment upon this statute is not entered for or against the party himself, as upon the 17 *Car.* II. but for or against his executors or administrators.^f And when the defendant dies after interlocutory and before final judgment, two writs of *scire facias* must be sued out by the plaintiff, before he can have execution; one before final judgment is signed, in order to make the executors or administrators parties to the record; the other after final judgment is signed, in order to give them an opportunity of pleading no assets, or any other matter in their defence; for it would be unreasonable that the executors or administrators should be in a worse situation, when their testator or intestate died before the final judgment was signed, than they would have been in, if he had died afterwards.^g

When there were two or more plaintiffs in a personal action, the death of one or more of them, *pending the suit*, would formerly in some cases have abated it.^h But now, by the statute 8 & 9 W. III. c. 11. § 7. "if there be two or more plaintiff's or defendants, and one or more of them die, if the cause of action shall survive to the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants, the writ or action shall not be thereby abated; but such death being suggested upon the record, the action shall proceed, at the suit of the surviving plaintiff or plaintiffs, against the surviving defendant or defendants."ⁱ In such case, if the death happen before declaration, it is usually suggested at the commencement of it: If it happen after declaration, and before issue joined, it should be suggested in making up the issue; but otherwise it need not be suggested till the judgment roll is made up.^k It is said that if a co-plaintiff die, the suit will be abated, unless the death be suggested according to the statute.^l But where one of two plaintiffs died before interlocutory judgment, and the suit notwithstanding went on to execution in the name of both; on a motion *to set aside [*1171] the proceedings for this irregularity, the court of King's Bench permitted the surviving plaintiff to suggest the death of the other on the roll, and to amend the *capias ad satisfaciendum*, without paying costs.^m But as no new person is introduced, there is no occasion for a *scire facias* in these cases, to revive the judgment.

^d Lil. Ent. 647.

^e 6 Mod. 144.

^f 1 Wils. 243. and see 1 Durnf. & East, 388. 2 Saund. 6. (2.) Append. Chap. XLIII. § 97.

^g 1 Salk. 42.

^h Bay. Rep. 266. And see further, as

to the *scire facias* on the death of a party before final judgment, 2 Saund. 72. *m. n. o.*

ⁱ Cro. Jac. 19. Carter, 193. 3 Mod. 249.

^j Ante, 967.

^k 1 Bur. 363. Barnes, 469. Ante, 782.

^l 1 Stark. Ni. Pri. 511.

^m 5 Durnf. & East, 577.

When there were two or more defendants, and one of them died *after judgment*, and before execution, it was formerly holden,^a that the plaintiff was put to his *scire facias* against the personal representatives of the deceased. But it was afterwards determined, that in such case a *scire facias* would lie against the survivor alone, reciting the death;^o and he could not plead that the heir of the deceased had assets by descent, and pray judgment if he ought to be charged alone; for at common law, the charge upon the judgment, being personal, survived;^p and the statute of *Westm. 2.* which gives an *elegit*, does not take away the common law remedy: and therefore the plaintiff may take out his execution which way he pleases.^q But if he should, after the allowance of this writ, and revival of the judgment, take out an *elegit* to charge the land, the party may have remedy by suggestion, or else by *audita querela*.^r And it is now settled, that when there are two or more plaintiffs or defendants in a personal action, and one or more of them die within a year after judgment, execution may be had for or against the survivors, without a *scire facias*.^s But the execution in such case should be taken out in the joint names of all the plaintiffs or defendants;^t otherwise it will not be warranted by the judgment.^u

When there is only one plaintiff or defendant, who dies *after final judgment*, and *before* execution, a *scire facias* may be had by or against his *personal* representatives; and upon the death of the party against whom the judgment is given, the other party may proceed by *scire facias* against his *heir* and *tertenants*. But when the plaintiff dies *after* the defendant is charged in execution, his executors, we have seen,^v are not bound to revive the judgment by *scire facias*, or to charge the defendant in execution *de novo*. In *ejactment* however, the original parties being merely *nominal*, there is no occasion for a **scire facias* after the death of either of [*1172] them. It also seems to be unnecessary, in case of the death of the lessor of the plaintiff before execution; for he is not a party to the judgment. And where a writ of possession was *tested* in his life-time, though it was not actually sued out till after his death, the court of King's Bench held the execution to be regular.^w If the *real* defendant die after judgment, and before execution, it is doubtful whether a *scire facias* is necessary; because the execution is of the land only, and no new person is charged;^x but where the judgment is after verdict, a *scire facias* must be sued out, to warrant an execution for the damages and costs; and if a *scire facias* issue, it must be against the *tertenants* of the land, (and the heir may come in as *tertenant*;) and not against the

^a Yelv. 208.

^o Append. Chap. XLIII. § 99. T. Raym. 26. 1 Lev. 30. 1 Keb. 92. 123. S. C. Carth. 106. S. C. cited.

^p 2 Saund. 51. (4.)

^q *Id. ibid.*

^r 3 Bac. Abr. 698. 4 Bac. Abr. 419.

^s Moor, 367. Noy, 150. Carter, 112. 193. 1 Ld. Raym. 244. 1 Salk. 319. Carth.

404. Comb. 441. 5 Mod. 338. 1 Show. 402. S. C. 3 Salk. 319. 7 Mod. 68. S. P.

^t 1 Ld. Raym. 244. 1 Salk. 319. S. C.

^u See further, as to the *scire facias* on *survivorship*, 2 Saund. 72. i. k.

^v *Ante*, *373.

^w 4 Bur. 1970.

^x *Per Holt*, Ch. J. 2 Ld. Raym. 808. 3 Salk. 319. S. P.

executor, without naming him *tertenant*.^a Upon a judgment in *ejectment*, if the defendant die after the writ of possession taken out, it may still be executed by the sheriff.^b

The personal representatives of the deceased party are his executor or administrator, or, if there be more than one, his executors or administrators, and the survivors of them; and the executor of an executor is considered as the representative of the first testator. If any of the executors or administrators are feme covert, their husbands must be made parties to the *scire facias*: And though an executor or administrator become bankrupt, yet he may still proceed by *scire facias*; as the bankruptcy does not affect him in his representative character. But the administrator of an executor, claiming by the act of the ordinary, does not represent the original testator;^c nor does the executor or administrator of an administrator represent the first intestate: Therefore, when an executor dies intestate, or after the death of an administrator, it is necessary to take out administration *de bonis non*, or of such goods as are left unadministered.^d

At common law, an administrator *de bonis non*, claiming by title paramount, could not have had a *scire facias*, or otherwise proceeded on a judgment recovered by an executor or administrator; but it was otherwise in the case of a judgment recovered against an executor or administrator.^e And now, by the statute 17 Car. II. c. 8. § 2. "where any judgment after a verdict shall be had by or in the name of any executor or administrator, in such case an administrator *de bonis non* may sue forth a *scire facias*, [*1173] and take execution upon such judgment." On this statute it has been holden, that an administrator *de bonis non* may not only commence an execution, on a judgment obtained by an executor or administrator, but may perfect an execution already begun.^f But still, if an executor bring a *scire facias* on a judgment or recognizance, and get judgment *quod habeat executionem*, and die intestate, the administrator *de bonis non* must bring a *scire facias* upon the original judgment, and cannot proceed upon the judgment in *scire facias*.^g

The *scire facias* on a judgment by the personal representatives states, in addition to the judgment, the death of the testator or intestate, as the court have been informed by the person suing it out, who is described as his executor or administrator:^h If the writ be brought against personal representatives, it states that the testator died, having made the defendant his executor, or, in the case of an administrator, the death of the intestate, and the grant of administration; and it is for the defendant to show, why the plaintiff should not have execution of the debt or damages, to be levied of the goods

^a Cro. Car. 295. 312. Carth. 2. 2 Salk.

600. 1 Ld. Raym. 669. S. C.

^b O. Bridg. 468, 9.

^c 1 Bos. & Pul. 310.

^d *Id. ibid.*

^e 1 Rol. Abr. 890. W. Jon. 214. Cro. Car. 167. S. C.

^f 1 Salk. 323.

^g 2 Ld. Raym. 1049.

^h Append. Chap. XLIII. § 100, &c. 107, 8. And see further, as to the *scire facias* against personal representatives, on the death of a party after final judgment, 2 Saund. 6. (1.) 72. a.

and chattels which were of the testator or intestate at the time of his death, in the defendant's hands to be administered, &c.¹ In a *scire facias* on a judgment recovered by an executor, the death of the testator need not be expressly averred.²

Upon the return of *nihil* to a writ of *scire facias* against the personal representatives, the plaintiff may have a *scire facias* against the *heir* of the defendant, either alone or jointly with the *tertenants*, or tenants of the lands whereof the defendant was seised at the time of the judgment, or at any time afterwards.³ But when judgment is had against one who dies before execution, a *scire facias* will not lie against his heir or *tertenants*, until *nihil* be returned against his executors or administrators;⁴ and as the heir in this case is charged as *tertenant*,⁵ the plaintiff can only have execution of a moiety of his land,⁶ even when he pleads a false plea.⁷

In a *scire facias* against the heir and *tertenants*, the heir cannot object that the *scire facias* ought first to have issued against him.⁸ [*1174] But it seems to be the better opinion, that the *tertenants* alone are not to be charged until the heir be summoned, or it be returned that there is no heir, or that the heir hath not any lands to be charged;⁹ for the heir may have a release to plead, or other matter in bar of execution: and his land is rather to be charged, than the land of the *tertenants*; for the heir shall not have contribution against the *tertenants*, as they shall against him: also, if the heir be within age, the *parol* shall demur, and the *tertenants* shall have advantage of it.¹⁰

When there are *several* defendants, and one of them dies before execution, since the charge upon the judgment survives as to the personality, though not as to the realty,¹¹ the plaintiff may have a *scire facias*, framed upon the special matter, *viz.* against the survivor, to show why the plaintiff should not have execution against him of his goods and chattels, and of a moiety of his lands, and against the heir and *tertenants* of the deceased, to show why the plaintiff should not have execution of a moiety of the deceased's lands, without mentioning any goods.¹²

The *scire facias* against the *tertenants* is either *general*, against all the *tertenants*, without naming them: or *special*, setting forth their names.¹³ But if a plaintiff undertake to name them all, he must do so; and if he do not, those who are named may plead in abatement.¹⁴ A plea to a *scire facias* against the heir and *tertenants*, that there are other *tertenants* not returned, is a dilatory plea, within the statute 4 & 5 Anne, c. 16. and requires to be verified by affidavit.¹⁵

There is also another writ of *scire facias*, which lies against

¹ Append. Chap. XLIII. § 104, &c. 109, 10.

² 1 Str. 631. 2 Ld. Raym. 1395. S. C.

³ 2 Saund. 7. (4.) and see *id.* 8. (9.) for the definition of *tertenants*.

⁴ Carth. 107. 2 Saund. 72. o. p.

⁵ 3 Co. 12. Cro. Car. 295. 312.

⁶ 2 Saund. 7. (4.)

⁷ *Id. ibid.* Cro. Car. 296. Carth. 93.

⁸ Cro. Eliz. 896. 2 Saund. 72. p.

⁹ 2 Saund. 8. (8.)

¹⁰ Bac. Abr. tit. *scire facias*, C. 5. Cro. Car. 295. 2 Saund. 7. (4.)

¹¹ *Anle*, 1171. 2 Saund. 51. (4.)

¹² Carth. 105. 2 Saund. 51. (4.) 72. p.

¹³ 2 Salk. 600. 1 Ld. Raym. 669. S. C. and see 2 Saund. 7. (4.) Append. XLIII. § 111, &c.

¹⁴ Comb. 282. 2 Saund. 7. (4.)

¹⁵ Forrest, 144.

tertenants, upon a writ of error to reverse a fine or recovery.^a This writ is said by Lord *Holt* to be discretionary, and not *stricti juris*; but yet to have been the constant and usual course of the court, and therefore not to be departed from.^b To this writ the tertendants can only plead a release of errors, to defend their own possession, or for the sake of purchasers; but they cannot plead in abatement of the writ, because they are not parties to the suit:^c And there is no necessity in such case, for a *scire facias* against the heir.^d

*Having hitherto treated of the writs of *scire facias* [*1175] on recognizances and judgments, in what cases they lie, and by and against whom they may be brought, with the forms of them, distinctly; I shall now consider them together, and shew the proceedings thereon, from the time of their being issued, till they are finally determined.

The *scire facias*, in the King's Bench, is made out by the plaintiff's attorney: and, in actions by *bill*, is signed by the signer of the writs; but in actions by *original*, it is signed by the filacer.^e In the Common Pleas, when there are two writs of *scire facias*, the first is made out and signed by the filacer; but the second is made out by the plaintiff's attorney, and signed by the prothonotary.^f

A *scire facias* on a recognizance of bail in the action, being an original proceeding, must, in the King's Bench, be brought in *Middlesex*, where the record is; for recognizances in this court are not obligatory by the caption, as in the Common Pleas, but by being entered of record.^g But in the case of a recognizance entered into by bail on a writ of error, it is said, that if it be entered as taken at a judge's chambers in *Serjeant's Inn*, the *scire facias* may be sued out in *London*:^h And, in the Common Pleas, upon a recognizance taken in *Serjeant's Inn*, or before a commissioner in the country, and recorded at *Westminster*, the *scire facias* may be brought in *London*, or in the county where the recognizance was taken, or in *Middlesex*.ⁱ A *scire facias* to revive a judgment by or against the parties or their personal representatives, not being an original proceeding, but a continuation of the former suit, must be brought in the county where the venue was laid in the original action, the defendants being supposed to reside in that county:^k But upon a return of *nihil* to the writ against the personal representatives, the plaintiff, upon a *testatum*, may have a *scire facias* against the heir and tertendants in a different county.^l

^a Carth. 111. Skin. 273. S. C. 1 Bur. 360.

^b 2 Saund. 72. p. 94. (1.)

^c Carth. 111. Skin. 273. S. C. 1 Bur. 359, 60.

^d 1 Bur. 412. and see 2 Saund. 72. p.

^e Imp. K. B. 9 Ed. 560. 567. Ante, 441.

^f Barnes, 97. Imp. C. P. 6 Ed. 487. 492.

^g 2 Salk. 564. 600. 659. 6 Mod. 42. 132. 7 Mod. 120. 21. R. E. 5 Geo. II. reg.

3. a. K. B. 1 Bur. 409. 5 East, 461. 2

Smith R. 14. S. C. Ante, *302.

^h 8 Mod. 290. R. E. 5 Geo. II. reg. 3. a.

K. B. Lil. Ent. 520.

ⁱ Hob. 195. Brownl. 69. Moor, 883. S.

C. Sty. Rep. 9. Aleyn, 12. S. C. 2 Lutw.

1287. Cas. Pr. C. P. 31. Barnes, 96, 7.

207. 2 Blac. Rep. 768. 2 Moore, 66. 8

Taunt. 171. S. C.

^k Hob. 4. Yelv. 218. Cro. Jac. 331. S. C.

R. E. 5 Geo. II. reg. 3. a. K. B.

^l Cro. Car. 313. Carth. 105. and see 7

Durnf. & East, 28. 2 Saund. 72. q. r.

The *scire facias* upon a recognizance against bail in the action, when the proceedings are by *bill*, ought to be *tested* on the return day, or, by *original* in the King's Bench,^m or Common Pleas,ⁿ on [*1176] the **quarto die post* of the return of the *capias ad satisfaciendum* against the principal.^o Upon a judgment, it may be tested at any time after the judgment, or first day of the term to which it relates: And it may be antedated, even in term time, unless where it issues by rule of court.^p In the King's Bench by *bill*, the *scire facias* is made returnable before the king at *Westminster*, on a day certain;^q and when there is but one writ, there need be only *four* days exclusive between the teste and return of it.^r But every *scire facias* by *original*, in that court, ought to have *fifteen* days inclusive between the teste and return;^s and should be made returnable on a general return day, wheresoever, &c.^t In the Common Pleas, the *scire facias* is returnable before the king's justices at *Westminster*, on a general return day; and when there is but one writ, as to revive a judgment, there should regularly be *fifteen* days between the teste and return. A *scire facias*, it has been said, is not *amendable*; and therefore, if it be defective in the teste or return, or vary from the record, &c. the plaintiff must move to quash it.^u But there are cases in the books, where a writ of *scire facias* has been amended by the courts; not only where it was bad on the face of it, by the mistake of the clerk, but also for a variance, when the defendant had not taken advantage of it by pleading *nul tiel record*.^x And it seems to be now settled, that the power of amending writs of *scire facias* against *bail* is discretionary; though the court of Common Pleas, in the exercise of their discretion, have in several recent instances refused to amend them.^y In the King's Bench, the plaintiff must pay costs, on quashing his own writ of *scire facias*, after the defendant has appeared thereto.^z But in the Common Pleas, the plaintiff may move to quash his own writ without paying costs, at any time before the defendant has pleaded.^a

The *scire facias* being sued out, is delivered to the sheriff; and if the bail or defendants live in the county into which the writ issues, [*1177] the plaintiff may cause them to be *summoned* thereon; for which purpose the sheriff will make out his warrant,^b a copy of which should be delivered to them, or they should have some notice of the proceeding, the sufficiency of which, if disputed, must be

^m Imp. K. B. 9 Ed. 560.

ⁿ Imp. C. P. 6 Ed. 492.

^o 6 Mod. 86. 8 Mod. 227. 2 Str. 866. 2 Ld. Raym. 1567. 8. C. R. E. 5 Geo. II. reg. 3. a. K. B.

^p 2 Salk. 599.

^q 2 Lil. P. R. 499, &c. R. E. 5 Geo. II. reg. 3. a. K. B. 2 Ld. Raym. 1417.

^r 4 Durnf. & East, 663. and see R. E. 5 Geo. II. reg. 3. a. K. B.

^s R. T. 8 W. III. reg. 1. a. R. E. 5 Geo. II. reg. 3. a. K. B.

^t 2 Lil. P. R. 499. 3 Salk. 320. 1 Str.

146. R. E. 5 Geo. II. reg. 3. a. K. B.

^u 1 Salk. 62. 1 Ld. Raym. 182. 548. 2

Ld. Raym. 1057. 1 Str. 401. 2 Str. 892. 1165. and see Barnes, 26, 7. 114. 15.

^x The several cases on this subject are collected in 2 Ld. Raym. 1057. and see 2 Saund. 72. r. Cas. Pr. C. P. 74, 5. Barnes, 59. S. C. Id. 4, 5. 2 Bos. & Pul. 275. 9 East, 316. 4 Price, 181, 2. 1 Chit. Rep. 323. (a.) *Ante*, *303.

^y 3 Bos. & Pul. 321. 2 New Rep. C. P. 103, but *vide ante*, *303. 1 Taunt. 221.

^z 1 Barn. & Ald. 486. and see 1 Str. 638.

^a Fr. Reg. 378, 9. Cas. Pr. C. P. 109. Barnes, 431. S. C. *Ante*, 982.

^b Append. Chap. XLIII. § 114.

determined by the court.* The bail may be summoned at any time before the rising of the court on the return day:^d And where the sheriff returns *scire feci*, the court will not enter into the validity of the summons upon motion, but leave the party to his action against the sheriff, for a false return.*

On the return day of the *scire facias* by *bill*, or *quarto die post* of the return by *original*, in the King's Bench,^f or Common Pleas,^g the sheriff may be called upon for the return of it; and, except on a *scire facias* against the heir and tertenants, he either returns *scire feci*,^h or *nihil*,ⁱ that he has given notice to the bail or defendants,^h or that they have nothing by which we can make known to them;ⁱ or that he has given notice to one, and the other had nothing,^k &c. On a *scire facias* against the heir and tertenants, the sheriff's return is either that there are none,^l or that he has warned them to appear: In the latter case, if the writ be general, the sheriff should return that he has warned certain persons, being the tenants of *all* the lands in his bailiwick, describing them; or the tenants of certain lands; and that there are no others:^m a return that he has warned the tenants of all the lands generally,ⁿ or certain persons, tenants of lands in his bailiwick,^o being insufficient.

When the sheriff returns *nihil*, the plaintiff, in the King's Bench, must in all cases sue out a second, or *alias* writ of *scire facias*:^p commanding the sheriff, as *before* he was commanded, &c.: and if upon this second writ, the sheriff also return *nihil*, and the bail or defendants do not appear, there shall be judgment against them;^q two *nihil*s being deemed equivalent to a *scire feci*.^r And it is not *necessary to give notice of *scire facias*'s to the bail; it [*1178] being their duty to watch the sheriff's office, where they are lodged.^s It was formerly usual, in the King's Bench, to sue out both writs of *scire facias* together, making the *teste* of the second as if the first had been actually returned:^t But now, there is a rule of court, that no writ of *alias scire facias* shall issue, until the first writ be returnable.^u In the Common Pleas, if a *scire facias* issue upon a judgment for debt and damages, against the defendant himself, who was party and privy to the judgment, and the sheriff return *nihil*, and the defendant make default, there shall be judgment against him, without awarding a second *scire facias*.^v And in that

* 2 Blac. Rep. 837.

^d 1 East, 86. and see 1 Str. 644. R. E. 5 Geo. II. reg. 3. (a.) K. B. but see 2 Durnf. & East, 757. *contra*.

^e 2 Str. 813. 3 Bur. 1360. 1 Blac. Rep. 393. S. C. And for the subsequent proceedings on writs of *scire facias* in general, before declaration, see 2 Saund. 72. *r. s. t.*

^f Imp. K. B. 9 Ed. 567. and see 13 East, 391.

^g Imp. C. P. 6 Ed. 487.

^h Append. Chap. XLIII. § 115.

ⁱ *Id.* § 116.

^k *Id.* § 117.

^l *Id.* § 120.

^m Co. Ent. 622, 3. *Off. Brev.* 278. 282.

286. Herne, 326. Dalt. Sher. 559. Append. Chap. XLIII. § 121.

ⁿ Carth. 105.

^o 2 Salk. 598. 2 Saund. 8. (7.)

^p 2 Inst. 472. Cro. Jac. 59. 8 Mod. 227. Say. Rep. 121. Append. Chap. XLIII. § 19. 122.

^q Dyer, 168. 172. 198. 201. Yelv. 112. Sty. Rep. 281. 288. 323.

^r See 1 East, 89. 4 East, 312.

^s *Silktoe v. Wallace and another, bail of Cawthorne*, M. 43 Geo. III. K. B.

^t 2 Salk. 599. 8 Mod. 227.

^u R. T. 8 W. III. K. B. 12 Mod. 87. 7 Mod. 40. 96.

^v Dyer, 168. a. 2 Inst. 472. 2 Salk. 599. Com. Dig. tit. *Pleader*, 3 L. 8.

court, a rule is given by the prothonotaries, on the return of the first *scire facias*, for another writ to issue.

When there are two writs of *scire facias*, the second should be tested on the return day, or by *original*, in the King's Bench,⁷ or Common Pleas,⁸ on the *quarto die post* of the return of the first, except in error;⁹ or unless the return day happen on a *Sunday*.⁵ The *alias* should be made returnable, like the first writ, on a day certain,⁶ or general return day, according to the nature of the proceedings. And, in the King's Bench by *bill*, it is sufficient if there be *fifteen* days inclusive between the teste of the first and return of the second writ, without regard to the number of days between the teste and return of each:⁴ But by *original* in that court, there should be *fifteen* days inclusive between the teste and return of the *alias*, as well as of the first writ of *scire facias*.⁶ In proceeding against bail however, in the Common Pleas, there need not be *fifteen* days between the teste and return of each *scire facias*; but it is sufficient if there be *fifteen* days between the teste of the first and return of the second.⁷ Every writ of *scire facias*, of which notice is given to the defendants, must be left in the sheriff's office, *four* entire days before the return:⁸ And when there are two writs, the first should be left in the office some time,⁹ (general [1179] rally *one* day,) and the *alias* *four* entire days, ¹⁰ before the return; which must be the *last* four days,¹¹ *exclusive* both of the day of lodging it, and day of the return:¹² and an intervening *Sunday* is not reckoned as one of them.¹³ The sheriff is required to indorse on every such writ, the day of the month it is left in his office:¹⁴ And, in order to found proceedings against bail, the *capias ad satisfaciendum* must be entered in the public book, kept at the sheriff's office for that purpose.¹⁵

On the return day of the second *scire facias*, or of the first, if *scire feci* be returned, the bail are absolutely fixed;¹⁶ and a *rule* must be given with the clerk of the rules in the King's Bench, for the bail or defendants to appear:¹⁷ which rule should be given on the return day in actions by *bill*, or, in actions by *original*, on the *quarto die post* of the return of the second *scire facias*, or of the first, if *scire feci* be returned;¹⁸ and expires in *four* days *exclusive*: and *Sunday* is not a day within this rule, though an intermediate

⁷ Imp. K. B. 9 Ed. 567.

⁸ Imp. C. P. 6 Ed. 487.

⁹ R. T. 8 W. III. a. K. B. and see 4 Durnf. & East, 377.

¹⁰ Dyer, 168. a.

¹¹ 2 Lil. P. R. 499, &c.

¹² T. Jon. 228. 2 Salk. 599. Carth. 468.

¹³ 7 Mod. 40. 8 Mod. 227. 2 Str. 765. 1139.

¹⁴ R. T. 8 W. III. a. R. E. 5 Geo. II. reg. 3. a. K. B.

¹⁵ R. E. 5 Geo. II. reg. 3. a. K. B.

¹⁶ Lutw. 24. Cas. Pr. C. P. 114. Pr. Reg.

¹⁷ 377. S. C. 2 Blac. Reg. 922.

¹⁸ Williams v. Mason, M. 4 Geo. II. K.

B. 1 East, 89. (a.) R. E. 5 Geo. II. reg. 3.

3 Bur. 1723. 4 Bur. 2439. K. B. Imp. C.

P. 536.

¹⁹ 4 Durnf. & East, 583. 13 East, 588.

²⁰ 4 Barn. & Ald. 537.

²¹ 1 Barn. & Ald. 528. and see 11 East, 271. 2 Chit. Rep. 192. 2 Dowl. & Ryl. 869. Ante, 1148.

²² R. E. 5 Geo. II. reg. 3. K. B.

²³ 5 Maule & Sel. 323. 2 Chit. Rep. 102.

²⁴ S. C. Ante, 1148. but see 3 East, 570. contra.

²⁵ Ante, *308. and see 1 East, 89. 4 East, 312.

²⁶ Append. Chap. XLIII. § 123.

²⁷ Imp. K. B. 9 Ed. 564. 567. and see 13 East, 391.

one.^a In the Common Pleas, the rule to appear, which also expires in *four* days exclusive,^b is given with the prothonotaries;^c and when *scire feci* is returned, it should be given on the *appearance day* of the return of the writ:^d but when there are two writs of *scire facias*, the rule, it is said, should be given on the *return day* of the last writ.^e Before the rule expires, the bail or defendants either appear, or make default. In the latter case, the plaintiff is entitled to judgment,^f or rather to an award of execution^g which he may sign on the expiration of the rule: And if a man have judgment for damages against two, and sue out a *scire facias* against both, if one be returned summoned and make default, and the other have nothing, the plaintiff may have execution against him who made default, for the whole.^h So, if it be returned that one of them is dead, he shall have execution for the whole against the other.ⁱ

Judgment being signed, the proceedings in *scire facias* should be forthwith entered on a roll, with an award of execution, and the roll *docketed.^b The *entry* of the proceedings is either against [*1180] bail,^c or in other cases.^d And, in the King's Bench, when two writs issue, returnable in different terms, the first must be entered of the term wherein it is returnable; and an award of the second is sufficient, without setting it forth at large.^e In the Common Pleas, if there be two writs of *scire facias*, returnable in different terms, there must be two rolls, one of the term the first writ was returnable, and the other of the term the second is returnable: on one of which rolls, the first writ is entered, with the sheriff's return thereto, and an award of the second writ only; and the other roll, which begins with an *alias prout patet*, contains a copy of the former roll, with the addition of the return to the second writ, and the entry of the judgment of the court.^f An allegation in a declaration with a *prout patet*, &c. that the plaintiffs by the judgment of the court recovered against the bail, is not proved by the production of the recognizance of, bail, and the *scire facias* roll, which latter concluded in the common form, that the plaintiffs have their *execution* thereupon against the bail; for this is an *award of execution*, or at most a judgment of *execution*, and not a judgment to *recover*.^g

If the bail or defendants *appear* to the *scire facias*, which, in the King's Bench, is signified by delivering a note in writing to the plaintiff's attorney,^h a declaration must be delivered, on four-penny stamped paper, a rule to plead given, and a plea demanded, as in other cases.ⁱ In the Common Pleas, the appearance is entered,

^a 11 East, 271. and see 1 Barn. & Ald. 528. 2 Chit. Rep. 192.

^b Imp. C. P. 6 Ed. 488.

^c *Id.* 487.

^d *Id. ibid.* ^e *Id. ibid.*

^f Com. Dig. tit. *Pleader*, 3 L. 8, 9.

^g 11 East, 516.

^h Bac. Abr. tit. *Execution*, G.

ⁱ *Id. ibid.*

^j Append. Chap. XLIII. § 29. 130, 31, 2.

^k *Id.* § 20, &c.

^l *Id.* § 124, &c. and see 2 Saund. 72.

^m *Id.*

ⁿ R. E. 5 Geo. II. reg. 3. a. K. B.

^o Imp. C. P. 535. 541. Append. Chap. XLIII. § 26.

^p 11 East, 516.

^q Append. Chap. XLIII. § 30. 133.

^r R. E. 5 Geo. II. reg. 3. a. K. B. Imp. C. P. 541.

on a *præcipe*,^k with the prothonotaries:^l And if the declaration, in that court, be not delivered *four* days exclusive before the end of the term, the defendant will be entitled to an imparlance.^m

The *declaration* in *scire facias*, in the King's Bench, begins by stating that the king sent to the sheriff, his writ close in these words, (setting forth the writ *verbatim*.) It then states the plaintiff's appearance at the return of the writ, and the sheriff's return thereto; and if he return *nihil*, it contains a recital of the mandatory part of the second writ of *scire facias*, and goes on to state the plaintiff's appearance, in like manner, at the return of that writ, and the sheriff's return thereto: Then follows the appearance of the bail or defendants; and the declaration against *bail* concludes, by praying [*1181] execution of the debt or damages recovered, by *bill*, or of the sum acknowledged, by *original*, according to the force, form and effect of the recognizance:ⁿ And though the original action was for *damages*, it is not demurrable, in *scire facias* against bail, to pray judgment in a replication, of *debt* and damages.^o Upon a *judgment* after a year and a day, the declaration concludes by praying execution of the debt or damages generally;^p or, against executors or administrators, of the debt or damages, to be levied of the goods and chattels of the original defendant, in their hands to be administered;^q or against the heir and tertenants, to be levied of the lands and tenements whereof they are returned tenants, or which have descended and come to the heir by hereditary descent from the defendant, according to the force, form and effect of the recovery.^r In the Common Pleas, the declaration begins by stating that the sheriff was commanded, whereas, &c. (reciting the writ of *scire facias* throughout;) after which it proceeds in substance as in the King's Bench.^s A declaration in *scire facias*, returnable the last return of a term, may, in the former court, be entitled of the same term generally.^t And it is usual for executors and administrators, in declaring on a *scire facias*, to make a *profert in curia* of the letters testamentary, or of administration; but it may be inserted either in the middle, or at the end of the writ.^u

To a *scire facias* on a recognizance or judgment, the defendant may plead in abatement or in bar, as in other actions.^x On a *general* writ of *scire facias* against the heir and tertenants, if some of the tertenants only are summoned, they may plead that there are other tertenants not named, in the *same* county, and pray judgment if they ought to answer *quousque* the others be summoned, but ought not to pray *quod breve cassetur*; for the court ought never to abate the writ, but when the plaintiff can have a better writ:^y But upon a

^k Append. Chap. XLIII. § 31. 134.

^l Imp. C. P. 522. 535. 541.

^m *Id.* 541.

ⁿ Append. Chap. XLIII. § 32, 3, 4.

^o 2 Chit. Rep. 322.

^p Append. Chap. XLIII. § 135, &c.

^q *Id.* § 144.

^r *Id.* § 145.

^s *Id.* § 35, 6. 140, 41. And see 2 Moore, 66. 8 Taunt. 171. S. C. as to the mode of declaring in *Middlesex*, on a recogni-

zance taken before a commissioner in *Durham*.

^t 3 Wils. 154. 2 Blac. Rep. 735. S. C.

^u Carth. 69. 1 Show. 60. 6 Mod. 134. 7

Mod. 15. and see 2 Saund. 9. (12.) 72. *t.*

^x 2 Inst. 470. 10 Mod. 112. and see 2

Saund. 72. *t. e. u.* 4 Moore, 163.

^y 2 Salk. 601. 6 Mod. 199. 226. 2 Ld.

Raym. 1253. 3 Salk. 321. S. C. 2 Saund. 8. (10.)

special writ, if all the tertenants are not named in it, those who are may plead in abatement; for there, the party may have a better writ, by naming them all.^a And it seems to be a good plea, that there are other tertenants not named, in *another county*.^a When a tertenant *is summoned, and doth not plead that there are other ter- [*1182] tenants, not summoned or named in the writ, he shall never afterwards have a *scire facias*, or *audita querela*, to compel the others to contribute.^b To a *scire facias* against a tertenant, upon a judgment in *debt*, or other personal action, the defendant cannot plead non-tenure generally, because it is contrary to the sheriff's return; but he may plead a special non-tenure in such case, as that he has only a term for years.^c

To a *scire facias* against bail in the action, they may plead *nul tiel record* of the recognizance,^d or of the recovery against the principal; payment by, or a release to the principal or bail;^e or that the principal rendered himself, or was rendered by his bail, before the return of the *capias ad satisfaciendum*.^f They may also plead, in discharge of their liability, that there was no *capias ad satisfaciendum* sued out and returned against the principal;^g and if there be a *void writ*, it is as none.^h But if the writ be merely *irregular*, as if it was sued out after a year without a *scire facias*,ⁱ or made returnable on a day out of term,^k or if it has not lain *four days* in the sheriff's office,^l the bail cannot take advantage of the irregularity by pleading;^m And the validity of a *feri facias* cannot be impeached at *nisi prius*, on the ground that the judgment ought to have been revived by *scire facias*, or that there was an irregularity in the return of the writ.ⁿ So, while the judgment against the principal remains in force, the court will not, on account of its irregularity, set aside the *capias ad satisfaciendum*, or other proceeding against the bail: But where judgment was irregularly signed against the principal, without first obtaining the usual rule for judgment, and the plaintiff proceeded to execution against the bail, after procuring a return of *non est inventus* to a *ca. sa.* against the principal, and two *nihilis* to be returned to two writs of *scire facias* against the bail, the court of King's Bench, upon the application of the bail, together with the principal, held that they were entitled to be released from such judgment against the principal, and its consequences against the *bail; upon [*1183] an affidavit made by them, that they had no notice of such judgment, till the writ of *ca. sa.* issued against the bail, when they applied to

^a 2 Salk. 601. 6 Mod. 199. 226. 2 Ld. Raym. 1253. 3 Salk. 321. 8. C. 2 Saund. 8. (10.)

^b 2 Vent. 104. Bac. Abr. tit. *Scire facias*, C. 5. 2 Saund. 8. (10.)

^c Moor, 524. 2 Saund. 8. (10.)

^d 2 Salk. 601. 3 Salk. 321. 6 Mod. 199. 226. 2 Ld. Raym. 1253. 2. C. and see Bac. Abr. tit. *Scire facias*, E. Com. Dig. tit. *Pleader*, 3 L. 11. ^e *Theat. Brev.* 265.

^f Sty. Rep. 324. 1 Ld. Raym. 157. Stat.

^g Ann. c. 16. § 12.

^h 1 Ld. Raym. 156, 7. *Healey v. Medley*, Vol. II.—51

M. 24 Geo. III. K. B.

ⁱ Sty. Rep. 281. 288. 324. And the replication to such plea should conclude to the record. 1 Kenyon, 347, 8.

^j 3 Keb. 671. 6 Mod. 304.

^k 2 Ld. Raym. 1096. 6 Mod. 304. Holt. Rep. 90. S. C. and see 1 Kenyon, 120.

^l 2 Bur. 1187, 8.

^m 1 Wils. 334. 16 East, 41. 1 Dowl. & Ry. 50. *Ante*, 744.

ⁿ *Powell v. Taylor*, M. 28 Geo. III. K. B. and see 5 Moore, 168.

^o 4 Campb. 58. and see 4 Price, 13.

vacate the proceedings.^o The practice of the court however is pleadable, when the merits of the case depend upon it: Therefore where bail, sued in *scire facias* upon their recognizance, plead that no *ca. sa.* was *duly* sued out returned and filed against the principal, according to the custom and practice of the court, to which the plaintiff in his replication shows a writ of *ca. sa.* issued into *Middlesex*, it is no departure for the defendant to rejoin, that the venue in the action against the principal was laid in *London*, for that sustains the plea.^p

If the principal *die* before the return of the *capias ad satisfaciendum*, this will operate in excuse of performance, and the bail may plead it in their discharge.^q So, they may plead that a writ of error was sued out and allowed after the issuing and before the return of the *capias ad satisfaciendum* against the principal, so as to avoid proceedings against them in *scire facias* upon the recognizance of bail, prosecuted after a return by the sheriff of *non est inventus*, made pending such writ of error.^r But it is not a good plea, that the principal died before the issuing,^s or after the return^t of the *capias ad satisfaciendum*; for though a plea that the principal died before the writ be issued, be conclusive if found for the *defendant*, yet it is not so, if found for the *plaintiff*; inasmuch as the principal might still have died after the issuing, and before the return of the writ: And when the principal dies after the return of the *capias ad satisfaciendum*, this will not discharge the bail; for upon the return of *non est inventus*, their recognizance is in strictness forfeited; and though a render afterwards, and before the return of the *scire facias*, is allowed, yet that is merely *ex gratia*, not *ex debito justitiæ*, and therefore cannot be pleaded.^u So, it is not a good plea, to an action [*1184] on a recognizance of bail, that after the judgment, the plaintiff entered into an agreement with the principal, without the privity of the bail, to take goods from the principal, to secure the payment of part of the money recovered, and that such goods were consigned to him accordingly.^x Where the principal died after a *capias ad satisfaciendum* returned, and before it was filed, the court of King's Bench on motion would have formerly stayed the filing of it, in favour of the bail:^y But in a late case it was holden, that if the principal die after the return of the *capias ad satisfaciendum*, and before the return is filed, the bail are fixed; and the court would not stay

^o 4 East, 310.

^p 16 East, 39. but see 1 Dowl. & RyL. 50. *Ante*, 744.

^q 1 Rol. Abr. 336. Cro. Jac. 165. W. Jon. 139. Sty. Rep. 324. 12 Mod. 601. 10 Mod. 267. R. E. 5 Geo. II. reg. 3. a. But they cannot plead the *bankruptcy* and certificate of their principal. 1 Bos. & Pul. 450. (b). 2 Bos. & Pul. 45.

^r 2 East, 439. In a similar case, *Buller*, J. said, "The *capias ad satisfaciendum* must be returnable before the suing out of the writ of error, to authorize proceedings against the bail. They have a right to bring the principal into court at the

return of the writ, if they can; but the writ of error rendering that impossible, shews that from the nature of the case, the execution must not only be sued out, but also returnable, before the issuing of the writ of error. *Anon.* H. 29 Geo. III. K. B.

^s 10 Mod. 267. 303.
^t 12 Mod. 112. 236. 8 Mod. 31. 1 Str. 511. 8. C. 2 Ld. Raym. 1452. 2 Str. 717. S. C. Say. Rep. 121. 2 Wils. 67. 2 Taunt. 246.

^u *Ante*, 310. ^x 8 Price, 467.
^y 1 Lil. P. R. 113. and see R. E. 5 Geo. II. reg. 3. a. K. B. 2 Crompt. 88. 1 Rich. Pr. 445.

the filing of the return.^a To a plea of the death of the principal, before the return of the *capias ad satisfaciendum*, the plaintiff in his replication must set forth the writ, and that the principal was alive at the return of it:^a and such replication must conclude with an averment.^b

If a *scire facias* be brought on a judgment, the defendant may plead *nul tiel record* of the recovery,^c payment,^d or a release;^e or that the debt or damages were levied on a *fieri facias*,^f the defendant's lands extended for them upon an *elegit*,^g or his person taken in execution on a *capias ad satisfaciendum*.^h But it is a rule, that the defendant cannot plead any matter to the *scire facias* on a judgment, which he might have pleaded in the original action.ⁱ If the *scire facias* be brought against an executor or administrator, he may plead *plene administravit*,^k but then, the judgment being entitled to a preference, he must shew in what manner he has administered.^l And when, in an action against an executor, the plaintiff dies after interlocutory and before final judgment, the defendant cannot plead to the *scire facias*, for assessing damages, a judgment upon bond against his testator, and no assets *ultra*; for the statute never intended that the executor should be in a better situation, as to the assessing of ^adamages upon the inquiry, than his testator, who could have [*1185] pleaded nothing but a release, or other matter in bar, arising *purs darrein continuance*.^m All pleas and demurrers upon writs of *scire facias*, ought to be delivered;ⁿ and all issues thereon made up by the attornies, in the King's Bench.^o In the Common Pleas, pleas and demurrers in *scire facias* are delivered, as in other cases, to the plaintiff's attorney, or filed with the prothonotaries;^p and issues are made up in like manner by, and delivered to the attornies, or, in country causes, by or to the agents in town.^q

^a 6 Durnf. & East, 284. *Ante*, 1148. and see 2 Saund. 72. *i. v.*

^b Carth. 4.

^c 2 Wils. 65. Doug. 58. 2 Durnf. & East, 576. and see 1 Kenyon, 345.

^d *Off. Brev.* 279. *Mod. Int.* 368.

^e Stat. 4 Ann. c. 16. §. 12.

^f 3 Lev. 272.

^g 4 Leon. 194. Sav. 123. Cro. Car. 328. *Clift*, 675.

^h Dyer, 299. b. 1 Lev. 93.

ⁱ *Off. Brev.* 300. 1 Salk. 271. *Ante*, 1069, 70. but see 1 Lutw. 641. 643.

^j Cro. Eliz. 283. 588. 1 Sid. 182. 1 Salk. 2. 2 Str. 1043. *Cas. temp. Hardw.* 233. S. C. Cowp. 727.

^k For the form of a replication and award of execution, in *scire facias* against an executor, who pleaded *plene administravit præter*, for the sum confessed in part, and for the residue of assets *quando*

acciderint, see Append. Chap. XLIII. § 146. and for the form of a judgment for the plaintiff, on demurrer to a plea in *scire facias* against an executor, in K. B. see *id.* § 147.

^l 1 I. d. Raym. 3, 4.

^m 1 Salk. 315. 6 Mod. 142. S. C. and see 2 Saund. 72. *v. u.* But *quære*, whether the interlocutory judgment in this case was not obtained against the testator, and, he dying, the *scire facias* issued against his executor?

ⁿ *Ante*, 724.

^o R. T. 12 W. III. a. K. B. *Ante*, 774. For the form of the issue in *scire facias* against bail, see Append. Chap. XLIII. § 37. and for the entry of issue and award of execution, &c. after verdict, see *id.* § 38.

^p *Ante*, 724.

^q *Ante*, 774. 784.

† Upon a *sci. fa.* on a judgment, the defendant having moved to plead several matters, viz. first, payment; secondly, that the judgment was fraudulent; thirdly, that the judgment was on a warrant of attorney fraudulently obtained; the court of C. P. refused to allow the three pleas, and put the defendant to his election. 2 Bingh. 325.

When the party has a release, or other matter which he might have pleaded to the *scire facias* in his discharge, and for want of pleading it, execution is awarded upon a *scire feci* returned, he is estopped for ever, and cannot by any means take advantage of that matter.^a But when execution is awarded on two *nihil*s returned, he may relieve himself by *audita querela*, though not by writ of error.^b And when the case is clear, and the application recent, the courts will interpose in a summary way, and relieve the party upon motion,^c without putting him to an *audita querela*.^d But they will never do it, when the fact is disputed;^e or there has been a long acquiescence, and several steps have been taken subsequent to the award of execution;^f or the ground of relief is such matter of fact as may be proper to be tried by a jury.^g

No damages are recoverable in *scire facias*, for delay of execution;^h and the parties were consequently not entitled to costs,ⁱ until the statute 8 & 9 W. III. c. 11. § 3. by which it is enacted, that "in all suits upon any writ or writs of *scire facias*, the plaintiff obtaining an award of execution after plea pleaded, or demurrer joined therein, shall recover his costs of suit; and if the plaintiff shall become nonsuit, or suffer a discontinuance, or a verdict shall [*1186] pass against him, the defendant shall recover his costs, and have execution for the same by *capias ad satisfaciendum*,^j *fieri facias*,^k or *elegit*." with a *proviso*, that the statute shall not extend to executors or administrators.^l

The execution, in *scire facias*, is governed by the award of it. But where two writs of *scire facias* had been sued out, one to revive the judgment in the original action, and the other to revive the judgment in error, for the costs in error, a *fieri facias* issued on the first *scire facias*, for the damages and costs in the original action only, and not including the costs in error, was holden to be regular.^m After judgment against the principal, and award of execution against the bail, the plaintiff may sue out execution against either of them.ⁿ And though, in the case of bail, the recognizance be to levy of the lands and chattels, yet, in the King's Bench, execution of the body by *capias ad satisfaciendum* is good,^o even as against bail in error,^p by the course of the court; and a *capias ad satisfaciendum* may be taken out against bail, without any *fieri facias*, or return of *nulla bona*.^q But it is otherwise in the Common Pleas; where no *capias*

^a F. N. B. 104. 1 Salk. 93. 264. 1 Wils. 98.

^b Sty. Rep. 281. 288. 323. 1 Salk. 262. 4 Mod. 314. S. C. 1 Str. 197. 1 Maule & Sel. 199.

^c 2 Ld. Raym. 1295. Barnes, 277. 1 Maule & Sel. 199.

^d For the nature of the remedy by *audita querela*, for whom and in what cases it lies, and in what not, and proceedings thereon, see 2 Saund. 148. a. (1.) *Ante*, 724. 774. 949.

^e 2 Str. 1198.

^f *Id.* 1075.

^g 1 Salk. 264.

^h 3 Bur. 1791. *Ante*, 920, 21. 980.

ⁱ *Sed vide ante*, 982.

^j Append. Chap. XLIII. § 51, &c.

^k *Id.* § 39, &c.

^l 1 Str. 188. 3 East, 202. *Ante*, 981.

^m And for the determinations on this statute, *vide ante*, 981, 2.

ⁿ 2 Chit. Rep. 240.

^o Cro. Jac. 320. and see Com. Dig. tit. *Bail*, R. 11.

^p 1 Rol. Abr. 897. 1 Lev. 226. 3 Salk. 286. Append. Chap. XLIII. § 51, &c.

^q 2 Str. 822. but see 1 Rol. Abr. 898. 3 Salk. 286, 7. *contra*.

^r 2 Str. 1139.

lies against the bail, after an award of execution on a *scire facias*; but the plaintiff must proceed against their lands and chattels, by *levari facias* or *elegit*, according to the terms of the recognizance.¹ Therefore, where the sheriff, having taken the bail on a *capias ad satisfaciendum*, after an award of execution on a *scire facias*, and discharged them, was sued for an escape, and the plaintiff declared for it in *debt*, with a count for money had and received, the court of Common Pleas ordered the *capias ad satisfaciendum* to be set aside, and the count for the escape to be struck out of the declaration; the sheriff paying the costs of that count, and of the application.² But a *capias* lies, after judgment given against the bail, in an action of *debt*.³ If the plaintiff proceed against the bail, and take them in execution, he cannot afterwards take the principal, though one of the bail become bankrupt and be discharged, and the other also be *discharged on payment of five shillings in the [*1187] pound, but upon an express understanding that the plaintiff shall be at liberty to proceed against the principal.⁴ And so, if the principal be in execution, the plaintiff, it is said, cannot take the bail.⁵ But if two be bail, although one be in execution, yet the plaintiff may take the other;⁶ and the recognizance being joint and several, the execution may be several, though the *scire facias*, was joint.⁷

¹ Dyer, 306. Cro. Jac. 450. Lit. Rep. 238. 1 Rol. Abr. 897. 2 D'Anv. Abr. 496. 3 Salk. 286. *Troughton v. Clarke & another*, bail of *Hammerton & another*, T. 49 Geo. III. per *Lawrence*, J. 2 Taunt. 113, 14. 6 Taunt. 490. 2 Marsh. 186. S. C. *Id.* 187. (a.) 1 Chit. Rep. 190. *Ante*, 1066. 1088.

= 6 Taunt. 490. 2 Marsh. 186. S. C.

= 3 Salk. 286.

= 2 Maule & Sel. 341. *Higgen's Case*, Cro. Jac. 320. 2 Bulst. 68. S. C. 1 Rol. Abr. tit. *Execution*, (G.) 10 Vin. Abr. 578. tit. *Execution*, (G. a.) pl. 1. accord. But where a plaintiff, acting under what he conceived to be sound advice, took the defendant, after he had taken his bail in execution, it was holden, that he was not liable to an action for maliciously arresting the defendant; although, previously

to the arrest, he had notice from the defendant, that his proceeding was illegal.

¹ Stark. *Ni. Pri.* 502. And in 1 Sid. 107. it was determined, that if execution be taken against the bail, and they pay part, yet the plaintiff may afterwards take execution against the principal for the residue, the bail being previously set at liberty; and this was said to be the constant practice of the court, and that in *Higgen's case*, it must be intended that the bail were in custody; and see Cro. Jac. 549. 1 Vent. 315. *Ante*, 1069, 70.

² Cro. Jac. 320. but see T. Jon. 75. 1 Vent. 315. 2 Mod. 312. 2 Lev. 195. 2 Bos. & Pul. 440. *semb. contra*.

³ Cro. Jac. 320.

⁴ 1 Lev. 225. 1 Sid. 339. S. C. Bac. Abr. tit. *Execution*, G. *Ante*, 1149.

CHAP. XLIV.

OF WRITS OF ERROR, AND FALSE JUDGMENT; AND THE PROCEEDINGS THEREON.

A WRIT of *error* is an *original* writ, issuing out of Chancery; and lies where a party is aggrieved by any error in the foundation, proceeding, judgment, or execution of a suit, in a court of record;^a and is in nature of a commission to the judges of the same or a superior court, by which they are authorized to examine the record, upon which judgment was given, and on such examination to affirm or reverse the same, according to law.^b This writ is grantable *ex debito justitiæ* in all cases, except in treason and felony.^c And it is said that whenever a new jurisdiction is erected by act of parliament, and the court or judge that exercise this jurisdiction, act as a court or judge of record, according to the course of the common law, a writ of error lies on their judgments; but when they act in a summary way, or in a new course different from the common law, there a writ of error lies not, but a *certiorari*.^d To amend errors in a court not of record, a writ of *false judgment* is the proper remedy.^e

The writ of error is usually brought by the party or parties against whom the judgment was given; or it may be brought by a plaintiff to reverse his own judgment, if erroneous, in order to enable him to bring another action.^f But the defendant is not allowed to bring it contrary to his own agreement, or that of his attorney.^g Therefore, when the defendants have agreed, under a consolidation rule, not to bring a writ of error, they are not allowed to do so, though there be manifest error on the record.^{h†} And

^a Co. Lit. 288. b. And for the proceedings in general on a writ of error, see 2 Wms. Saund. 101. *a* to *y*.

^b 2 Bac. Abr. 187. 1 Str. 607. 2 Ld. Raym. 1403. S. C. Cas. temp. Hardw. 346.

^c 2 Salk. 504.

^d 1 Salk. 144. 263. and see 3 Salk. 148.

^e Co. Lit. 288. b. Finch, L. 484. 3 Blac. Com. 406.

^f 3 Bur. 1772.

^g 2 Durnf. & East, 183, and see 8 Taunt. 434.

^h 1 H. Blac. 21. and see 8 Taunt. 434.

† Where the defendant obtained time to plead on the terms of giving judgment of the term, and afterwards brought a writ of error, the court quashed the writ, though there was no stipulation that it should not be brought. 3 Barn. & Cres. 735.

where executors, against whom a *scire facias* had been sued out, to recover damages assessed on an interlocutory judgment against their testator, brought a writ of *error, after the testator's attorney had agreed for him that no writ of error should be brought, the court of King's Bench on motion ordered the attorney to *non-pros* the writ of error; for the *scire facias* was merely a continuation of the proceedings in the original action; and as the testator himself, if he had lived, could not have brought a writ of error, in consequence of the agreement, so neither could his executors.¹ But a consent to confess judgment in a second action, with a stay of execution till a writ of error be determined on the original judgment, does not prevent the defendant from bringing a writ of error on the second judgment, after affirmance of the first, unless it be so expressed in the rule.²

If an action be brought against a *feme covert* as a *feme sole*, and she plead to issue as a *feme sole*, and judgment be given against her, upon which she is taken in execution, she and her husband must join in bringing a writ of error; for otherwise the husband might be prejudiced by losing the society of his wife, and her care in his domestic concerns, and he hath no other means to help himself.¹ So, if an action be brought against a *feme covert* and others, they may all join with the husband in bringing a writ of error.²

It is a general rule, that no person can bring a writ of error to reverse a judgment, who was not party or privy to the record, or prejudiced by the judgment, and therefore to receive advantage by the reversal of it.³ Hence it has been determined, that if there be judgment against the *principal*, and also against the *bail*, the principal cannot have error on the judgment against the bail,⁴ nor the bail on the judgment against the principal,⁵ nor can they join in a writ of error;⁶ for these are distinct judgments, and affect different persons.

On a judgment against *several* parties, the writ of error must be brought in all their names,⁷ provided they are all living, and aggrieved by the judgment; for otherwise this inconvenience would ensue, that every defendant might bring a writ of error by himself, and by that means delay the plaintiff from his execution for a long *time, and from having any benefit of his judgment, though [*1190] it might be affirmed once or oftener.⁸ And if the writ of error in such case be brought by one or more of the defendants only, it may

¹ 1 Durnf. & East, 388. *Ante*, 1145.

² 2 Blac. Rep. 780.

³ 1 Rol. Abr. 748. Sty. Rep. 254. 280.

⁴ 1 Rol. Abr. 748.

⁵ 2 Bac. Abr. 195. 2 Saund. 46. (6.) 101. c.

⁶ 2 Bac. Abr. 199. 1 Rol. Abr. 748, 9. Cro. Car. 408. and see Lil. Ent. 378. and the cases there cited.

⁷ 2 Leon. 101. Cro. Car. 408. 481. 561. 1 Ld. Raym. 328. Carth. 447. S. C.

⁸ Palm. 567. Cro. Car. 300. 408. 574. 5.

⁹ 6 Co. 25. Cro. Eliz. 648, 9. S. C.

Yelv. 4 Cro. Eliz. 892. S. C. Carth. 7, 8. 3 Mod. 134. S. C. 1 Ld. Raym. 71. 151. 5 Mod. 16. 69. Carth. 367. Comb. 354. Holt, 54. S. C. 1 Ld. Raym. 244. Carth. 404. Comb. 441. 1 Salk. 319. 5 Mod. 338. S. C. 1 Ld. Raym. 328. 2 Ld. Raym. 870. 1 Salk. 312, 13. S. C. 6 Mod. 40. 1 Str. 234. 2 Ld. Raym. 1403. 1 Str. 606. 8 Mod. 305. 316. S. C. 2 Ld. Raym. 1532. Cas. temp. Hardw. 135, 6. Barnes, 202. 1 Wils. 88. 3 Bur. 1792. 2 Durnf. & East, 737.

¹⁰ Carth. 8 and see 3 Bur. 1789.

be quashed;⁶ or the courts will give the plaintiff leave to take out execution.⁷ But when judgment is given against several parties, and one or more of them die, the writ of error may be brought by the survivors.⁸ And in *trespass* against three, if there be judgment by default against two of them, and the third plead to issue, and it be found for him, the two only may bring a writ of error; for the party in whose favour the judgment was given, cannot say that it was to his prejudice.⁹ So, if a writ of error be brought in the names of several parties, and any one or more of them refuse to appear and assign errors, they must be *summoned* and *severed*; after which the writ of error may be proceeded in by the rest alone.¹⁰ And where a writ of error was brought in the names of two executors, and one would not join in assigning errors, the court of King's Bench gave the other time to assign them, till there could be summons and severance.¹¹

On a writ of error brought against two executors, one only appeared, and sued out a *scire facias quare executionem non*, upon which the judgment was affirmed for both executors; and upon a second writ of error, the court held, that a *scire facias quare executionem non* is only to bring in the plaintiff in error to assign his errors; and as he came in upon it, and assigned his errors, he waived any objection, and admitted the one executor to be sufficient to call upon him to assign them, and the court are not to presume that the other executor is alive: And though a writ of error by one alone, upon a judgment against two, be not good, yet that is on account of the inconvenience that would arise from a perpetual delay of execution, if every defendant might bring a writ of error by himself; but that reason does not hold in this case, where the executors are defendants in error, and not plaintiffs.¹²

[*1191] A writ of error lies for some error or defect in substance, that is not aided, amendable, or cured at common law, or by some of the statutes of amendments or jeofails:¹³ And it lies to the *same* court in which the judgment was given, or to which the record is removed by writ of error, or to a *superior* court. If a judgment in the King's Bench be erroneous in matter of *fact* only, and not in point of law, it may be reversed in the *same* court, by writ of error *coram nobis*, or *qua coram nobis resident*;¹⁴ so called, from its being founded on the record and process, which are stated in the writ to remain in the court of the lord the king, before the king himself; as where the defendant, being under age, appeared by attorney, or the

⁶ 6 Co. 25. Cro. Eliz. 648, 9. S. C. Yelv. 4. Cro. Eliz. 892. S. C. Carth. 7, 8. 3 Mod. 134. S. C. 1 Ld. Raym. 71. 151. 5 Mod. 16. 69. Carth. 367. Comb. 354. Holt, 54. S. C. 1 Ld. Raym. 244. Carth. 404. Comb. 441. 1 Salk. 319. 5 Mod. 338. S. C. 1 Ld. Raym. 328. 2 Ld. Raym. 870. 1 Salk. 312, 13. S. C. 6 Mod. 40. 1 Str. 234. 2 Ld. Raym. 1403. 1 Str. 606. 8 Mod. 305. 316. S. C. 2 Ld. Raym. 1532. Cas. temp. Hardw. 135, 6. Barnes, 202. 1 Wils. 88. 3 Bur. 1792. 2 Durnf. & East, 737.

⁷ Barnes, 202.

⁸ Palm. 151. 1 Str. 234.

⁹ 1 Lev. 210. Hob. 70. 1 Str. 683. 2 Str. 892. 1110. Cowp. 425. 2 Blac. Rep. 1067. but see Sty. Rep. 190. 3 Salk. 146. *semb. contra.*

¹⁰ Yelv. 4. Cro. Eliz. 892. S. C. Cro. Jac. 117. Carth. 7, 8. 3 Mod. 134. S. C. 6 Mod. 40. 1 Str. 234. Cas. temp. Hardw. 135, 6.

¹¹ 2 Str. 783.

¹² 3 Bur. 1789.

¹³ *Ante*, 949, &c.

¹⁴ Append. Chap. XLIV. § 2, 3, 4.

plaintiff or defendant was a married woman at the time of commencing the suit, or died before verdict, or interlocutory judgment: for error in fact is not the error of the judges, and reversing it is not reversing their own judgment.^d So, upon a judgment in the King's Bench, if there be error in the *process*, or through the default of the *clerks*, it may be reversed in the same court, by writ of error *coram nobis*.^e But if an erroneous judgment be given in the King's Bench, and the error be in the judgment itself, and not in the process, a writ of error does not lie in the same court upon such judgment.^f In the Common Pleas, the record and process being stated to remain before the king's justices, the writ is called a writ of error *coram vobis*, or *quæ coram vobis resident*.^g A writ of error, in respect of *coverture*, may in general be brought in the same court in which the judgment was given, or in another court; except in the court of Exchequer chamber, where there is no jury to try an issue in fact.^h And it is said, that if judgment be given in the King's Bench in *civil* actions, a writ of error will not lie in the same court, but only for errors in fact triable by a jury; but upon a judgment in *criminal* cases, error will lie in the King's Bench, whether the error be in fact or law; though it lies also in parliament.ⁱ

If a writ of error returnable in the King's Bench *abate*, after removal of the record, by death or otherwise,^k or be *quashed* for any other fault than variance,^l error *coram nobis* lies in the same court *to which the record is removed: But formerly, if there [*1192] had been a *variance* between the record and the writ of error, the record not being removed, there must have been a new writ;^m which is also necessary, and may be had after the *non pros* of a former writ of error, before the removal of the record.ⁿ And error *coram nobis* lies not in the King's Bench, after an *affirmance* in that court,^o or in the Exchequer chamber.^p Neither does it lie, for error in *fact*, in the Exchequer chamber,^q or House of Lords; for the record is not removed thither, but only a transcript; and it is said to be beneath the dignity of the House of Lords, that being the supreme judicature, to examine matters of fact.^r

For the error or mistake of the judges, in point of *law*, a writ of error lies to the King's Bench, from the Common Pleas at *Westminster*,^s and from all inferior courts of record in *England*,^t except in *London*,^u and some other places; and after judgment given thereon, a second writ of error may be brought, returnable in the House

^d 1 Rol. Abr. 747. Cro. Eliz. 105, 6. 1 Sid. 208. 3 Salk. 145, 6, 7. 16. 69. S. C. 1 Str. 606. 2 Ld. Raym. 1403. 8 Mod. 305. 316. S. C.

^e 1 Rol. Abr. 746. F. N. B. 21. Poph. 181. ^m Godb. 375. but see stat. 5 Geo. I. c. 13.

^f 1 Rol. Abr. 746.

^g Append. Chap. XLIV. § 5.

^h 1 Chit. Rep. 372. *per Bayley, J.*

ⁱ 3 Salk. 147. and see *Cornhill's case*, 1 Lev. 149. 1 Sid. 208. S. C. ^o Bro. Abr. tit. *Error*, pl. 121. 10 Vin. Abr. 16. pl. 11. 3 Salk. 146.

^k 1 Rol. Abr. 753. Yelv. 6. Cro. Eliz. 891. S. C. Godb. 375. Latch, 198. S. C. ^p 2 Str. 949. 975. 1 Salk. 337. *semè. contra.*

^l 1 Ld. Raym. 151. Carth. 367. 5 Mod ^q 1 Str. 690.

ⁿ Vol. II.—52

^r 1 Rol. Abr. 755. Com. Rep. 597.

^s 3 Salk. 143, 6. ^t 4 Inst. 22.

^u Append. Chap. XLIV. § 6.

^v 2 Bur. 777.

of Lords: but error lies not from an inferior court to the Common Pleas.^a

In *London*, a writ of error lies from the sheriff's courts, to the court of hustings of common pleas; and from the court of hustings, whether of common pleas or pleas of land, and also from the law side of the mayor's court, to a court of appeal held before commissioners appointed under the great seal, and from thence immediately to the House of Lords.^b It also seems, that the appeal against decrees made on the equity side of the mayor's court, is immediately to the House of Lords.^c

On a judgment given in the *Cinque ports*, no writ of error lies in the King's Bench or Common Pleas; but by custom, such judgment is examinable by bill, in nature of a writ of error, before the lord keeper or warden of the *Cinque ports*, at his court of *Shepway*.^a So, if a judgment be given in the court of *Stannaries*, in the duchy of *Cornwall*, for any matter touching the stannaries,^b no writ of error lies upon this in the King's Bench or Common [*1193] Pleas; but an appeal to the warden of the *Stannaries*, and from him to the prince of *Wales*, and when there is no prince, to the king in council.^c

A writ of error lies at common law in the King's Bench, upon a judgment in a *county palatine*; for though these are superior courts, and have *jura regalia*, yet their jurisdiction is derived from the crown.^d And, by the 34 & 35 *Hen. VIII. c. 26. § 113.* and 1 *W. & M. c. 27.* errors in judgments, in pleas real mixed and personal, before the justices in their great sessions in *Wales*, shall be redressed by writ of error, in the King's Bench in *England*.

At common law, no writ of error lay on a judgment from the King's Bench, except in parliament; by which means the subject was often disappointed of his writ of error, either by the not sitting of parliament, or by their being employed in public business, when they did sit.^e To remedy this, it was enacted, by the statute 27 *Eliz. c. 8.* that "where any judgment shall be given in the King's Bench, in any action of debt, detinue, covenant, account, action upon the case, ejectment, or trespass, *first commenced there*, other than such only where the Queen shall be party, the plaintiff or defendant, against whom such judgment shall be given, may, at his *election*,^f sue out of the court of Chancery, a special writ of error, directed to the chief-justice of the King's Bench, commanding him to cause the record, and all things concerning the judgment, to be brought before the justices of the Common bench, and barons of the Exchequer, into the Exchequer chamber, there to be examined by the said justices and barons; which said justices, and such barons as are of the degree of the coif, or six of them, shall have full power

^a Finch, L. 480. Cro. Eliz. 26. 3 Blac. Com. 411.

^b Emerson, on the City Courts, 27. 76. 97. 2 Bac. Abr. 215.

^c Emerson, on the City Courts, 86.

^d 4 Inst. 224.

^e 3 Bulst. 183.

^f 1 Rol. Abr. 745. and see 3 Blac. Com. 80. 1 Bac. Abr. tit. Courts of the *Stannaries*, and Jacob's Law Dictionary, tit. *Stannaries*.

^g 1 Rol. Abr. 745. 4 Inst. 214. 218. 223. Append. Chap. XLIV. § 7.

^h 2 Bac. Abr. 212.

ⁱ 3 Salk. 147.

and authority to examine all such errors as shall be assigned in or upon any such judgment, and thereupon to reverse or affirm the same, as the law shall require, other than for errors concerning the jurisdiction of the court of King's Bench, or for want of form in any writ, return, plaint, bill, declaration, or other pleading, process, verdict, or proceeding whatsoever; and after the said judgment shall be affirmed or reversed, the said record, and all things concerning the same, shall be brought back into the King's Bench, that further proceeding may be had thereupon, as well for execution as otherwise: But such reversal or affirmation shall not be so final, but that the party grieved shall and "may sue in the high court of [*1194] Parliament, for the further and due examination of the said judgment, as was then usual upon erroneous judgments in the court of King's Bench."

This statute is confined to the particular actions enumerated therein; and does not extend to actions of replevin,^a rescous,^b *scandalum magnatum*,^c ravishment of ward,^d or *scire facias* against bail,^e &c.: In these actions therefore, error will not lie in the Exchequer chamber, but must be brought in parliament. In *scire facias* on a judgment, against the party or his executors, it seems that error lies in the Exchequer chamber, *tam in redditione judicii, quam in adjudicatione executionis*,^f but not upon an award of execution only.^g Errors in *fact*, being examinable in the King's Bench, cannot legally be assigned in the Exchequer chamber:^h yet if a release of errors be pleaded in that court, they may try it, and award a *venire*, under the seal of the court of Exchequer.ⁱ

We have already seen, that a writ of error does not lie in the Exchequer chamber, upon a judgment of the King's Bench, in an action commenced by *original writ*; because it is not first commenced in the King's Bench, but is founded upon the original writ issuing out of Chancery.^j And, for a similar reason, a writ of error lies not in the Exchequer chamber, upon a judgment affirmed on error in the King's Bench, but must be brought in the House of Lords.^k So, where a judgment of the King's Bench was affirmed in the Exchequer chamber, upon which the plaintiff sued out a *scire facias* in the King's Bench, and had an award of execution, and afterwards the defendant brought a writ of error in the Exchequer chamber, *tam in redditione judicii, quam in adjudicatione executionis*, the court held that this writ of error did not lie, and was no *supersedeas* of execution.^l But notwithstanding that part of the statute which excepts actions where the Queen shall be party, it has been holden that a writ of error lies in the Exchequer chamber, upon a judgment in an action of debt *qui tam*, upon the statute of usury.^m

^a 2 Rol. Rep. 434.

^b Moor, 694. Cro. Jac. 171.

^c Cro. Car. 142. W. Jon. 194. Ley, 82.

^d S. C. 1 Sid. 143. 1 Vent. 49. 2 Ld. Raym. 954.

^e 2 Rol. Rep. 134.

^f Yelv. 157. Cro. Jac. 171. Cro. Car. 286. 300. W. Jon. 325. 1 Ld. Raym. 98. but see Cro. Eliz. 730. *contra*.

^g Cro. Car. 286. 464. 1 Ld. Raym. 98.

^h 2 Str. 1102. Andr. 287. S. C.

ⁱ 2 Lev. 38. 1 Vent. 207. 2 Mod. 194.

^j Com. Rep. 597. ^k 2 Str. 821.

^l *Ante*, *117. and see 1 Saund. 346. *e*. (4.)

^m 2 Bulst. 162. and see 1 Rol. Rep. 264.

ⁿ 1 Salk. 263. 1 Ld. Raym. 97. 5 Mod. 228. S. C.

^o Doug. 350. *Lloyd v. Skutt*, T. 23 Geo. III. K. B.

[*1195] From proceedings on the *law* side of the Exchequer in *England*, a writ of error lies into the court of Exchequer chamber, before the lord chancellor, lord treasurer, and judges of the court of King's Bench and Common Pleas;^a and from thence it lies to the House of Peers:^x but against decrees on the *equity* side of the Exchequer, the appeal is to the House of Peers in the first instance.

Before the union with *Scotland*, a writ of error lay not in this country, upon any judgment in *Scotland*; because it was a distinct kingdom, and governed by distinct laws:^y but it is since given by statute,^z from the court of Exchequer in *Scotland*, returnable in parliament.^a A writ of error formerly lay from the King's Bench in *Ireland*, to the King's Bench in *England*, and from thence to the House of Lords; but now, by the statute 23 Geo. III. c. 28. § 2. "no writ of error or appeal shall be received or adjudged, or any other proceedings had, by or in any of his majesty's courts in this kingdom, in any action or suit at law or in equity, instituted in any of his majesty's courts in the kingdom of *Ireland*; and all such writs, appeals, or proceedings shall be, and they are thereby declared null and void, to all intents and purposes." Since the union with *Ireland*, however, a writ of error lies from the superior courts in that country, to the House of Lords.

No writ of error can be brought but on a judgment, or an award in nature of a judgment; for the words of the writ are, *si judicium redditum sit*,^b &c. And hence it was formerly holden, that a writ of error could not be brought *before* judgment given; and if tested before, it was no *supersedeas*.^c But it seems to be now agreed, that a writ of error, bearing *teste* before judgment, is good, so as the judgment be given before the return of it; and this is the usual course for preventing execution.^d And the allowance of it may be served before the return of the writ of inquiry and final judgment.^e Still however, if the writ of error be returnable before judgment, it may be quashed.^f And a writ of error will not lie on a judgment of *respondeat ouster*, on a plea to the jurisdiction.^g

[*1196] After judgment, *twenty* years are allowed for bringing a writ of error: And, by the statute 10 & 11 W. III. c. 14. "no judgment in any real or personal action, shall be reversed or avoided, for any error or defect therein, unless the writ of error be brought, and prosecuted with effect, within *twenty* years after such judgment signed, or entered of record." This statute has the usual exceptions, in favour of infants, *feme covert*s, persons

^a Append. Chap. XLIV. § 16.

^x 3 Blac. Com. 411. And see the statutes 31 Ed. III. stat. 1. c. 12. 31 Eliz. c. 1. 16 Car. II. c. 2. & 20 Car. II. c. 4. 2 Bac. Abr. tit. *Error*, I. 3. Man. Ex. Pr. 478, &c.

^y Show. P. C. 33.

^z 6 Ann. 26. § 12. And see the statute 48 Geo. III. c. 151. concerning appeals to the House of Lords, from the court of Session in *Scotland*.

^a Append. Chap. XLIV. § 17.

^b Co. Lit. 288. b. 6 East, 336.

^c 2 Bac. Abr. 199. 1 Rol. Abr. 749. Moor, 461.

^d March, 140. 1 Vent. 96. 255. 1 Mod. 112. 3 Keb. 308. 8. C. 1 Str. 632. 1 Durnf. & East, 279.

^e *Per Cur.* T. 25 Geo. III. K. B.

^f 2 Ld. Raym. 1179. 1531. 2 Str. 884. 891.

^g *Hodgson v. Miles*, E. 26 Geo. III. K. B. *per Buller, J.*

non compos mentis, imprisoned, or beyond the seas. And the court on motion would not quash a writ of error, though brought twenty-nine years after the judgment; for this would be to deprive the party of the benefit of replying the exceptions in the statute.¹

A writ of error, like a *scire facias*, is considered as a new action: and therefore, upon bringing it, the defendant in the original action may change his attorney, without obtaining a judge's order for that purpose.¹ To obtain a writ of error, application must be made by the attorney, to the cursitor of the county where the venue was laid in the original action; who will make out the writ in ordinary cases, as matter of course, upon a *præcipe*² or note of instructions, containing the names of the parties, the nature of the judgment, the court wherein it was given, and the time when the writ is intended to be returnable. In parliament, there must be a warrant for the writ of error from the crown, which is procured by the cursitor;³ and, when it is against the king, the *fiat* of the attorney general must be obtained, upon a petition, setting forth the errors intended to be assigned, accompanied with a certificate from counsel, that they are real errors. This practice was anciently used,⁴ as a mark of decency and respect; and though it appears to have been laid aside in the time of the usurpation,⁵ yet it since has been revived.

The writ of error, which is subject to the stamp duty of *twenty shillings*,⁶ runs in the king's name; and, on a judgment recovered in the King's Bench, the writ of error, whether it be returnable in the Exchequer chamber⁷ or in-Parliament,⁸ is directed *to our right trusty and well beloved Sir Charles Abbot, Knight, our chief-justice assigned to hold pleas in our court before us*;⁹ unless it be a writ of error *coram nobis*, and then it is directed *to our justices assigned to hold pleas before us*;¹⁰ or, if a writ of error [*1197] *coram vobis, to our justices of the bench*. On a judgment recovered in the Common Pleas, the writ of error is directed *to our right trusty and well beloved Sir Robert Dallas, Knight, our chief justice of the bench*;¹¹ unless it be to reverse a fine levied in that court, in which case the writ of error is directed to the Chirographer, for the transcript of the *note* of the fine, and *writ* of covenant;¹² or to the *custos brevium*, for the transcript of the *foot* of the fine.¹³ On a judgment in the Exchequer of Pleas, the writ of error is directed *to our treasurer, and barons of our Exchequer*;¹⁴ for though the barons only are judges, yet the treasurer, together with them, hath the custody of the records of the court.¹⁵

¹ 2 Str. 837.

² 7 Durnf. & East, 337. *Ante*, 89.

³ Append. Chap. XLIV. § 1. 8. 11.

⁴ Imp. K. B. 705.

⁵ Sav. 131.

⁶ 1 Salk. 264.

⁷ Stat. 48 Geo. III. c. 149. *Sched. Part*

II. § III. 55 Geo. III. c. 184. *Sched. Part*

II. § III.

⁸ Append. Chap. XLIV. § 12.

⁹ Lil. Ent. 334. Append. Chap. XLIV.

§ 13, 14, 15.

¹⁰ L. P. E. 167. Lil. Ent. 213. Append.

Chap. XLIV. § 12.

¹¹ Lil. Ent. 220. 231, 2. Append. Chap.

XLIV. § 2, 3, 4.

¹² L. P. E. 67, 8. 78, 9. LH. Ent. 222.

268. Append. Chap. XLIV. § 5. 9, 10.

¹³ Lil. Ent. 280. ¹⁴ *Id.* 282.

¹⁵ Append. Chap. XLIV. § 16.

¹⁶ 4 Inst. 105. Sav. 33, 6. Bac. Abr. tit. *Error*, I. 3.

On a judgment in the county palatine of *Lancaster*, the writ of error is directed to the Chancellor, or his deputy, commanding him that he give in charge to the justices at *Lancaster*, that they send to him in his Chancery, the record, &c. and the writ which came to them thereupon, and that he transmit the record,^a &c. And, on judgments in inferior courts, the writ of error should be directed to the judges before whom the judgment was given.^b

In point of *form*, the body of the writ of error, when returnable in the King's Bench, on a judgment of the Common Pleas, runs thus: "Because in the record and process, and also in the giving of judgment, in a plaint which was in our court, before you and your companions, our justices of the Bench, by our writ, between A. B. and C. D. late of, &c. of a plea of, &c. (*describing the nature of the action*,) manifest error hath intervened, to the great damage of the said C. D. as from his complaint we are informed; we being willing that the error, if any there be, should in due manner be corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, that if judgment be thereupon given, then you do distinctly and openly send to us, under your seal, the record and process aforesaid, with all things touching the same, and this writ, so that we may have them on, &c. (*a general return day*,) wheresoever we shall then be in *England*, that the record and process aforesaid being inspected, we may cause to be further done thereupon, for correcting that error, what of right and accord- [*1198] ing to the law and *custom of *England*, ought to be done."^c This writ consists of two parts; first, a *certiorari* to remove the record, and secondly, a *commission* to examine it.^d But in a writ of error *coram nobis* or *vobis*, the *certiorari* part being unnecessary, is omitted, and the writ contains only a commission to examine errors.^e On a judgment in an inferior court, the writ of error begins by reciting that "in the record and process, &c. in a plaint which was before you, in the court of, &c. without our writ, between, &c. manifest error hath intervened, &c.;" and it is made returnable on a *general* return day, wheresoever, &c.^f

When the writ of error is returnable in the Exchequer chamber, it begins by reciting the statute 27 *Eliz.* c. 8. and brings the case within that statute, by stating that the error in no wise concerns the king, or the jurisdiction of the court of King's Bench, or any want of form in any writ, &c.^g In the House of Lords, the writ of error differs in point of form, accordingly as it is brought on a judgment originally given in the court of King's Bench,^h on a judgment affirmed there,ⁱ or in the Exchequer chamber.^k And when the error is supposed to be as well in giving the judgment, as in awarding execution thereon, the writ of error is said to be *tam quam*, or, in

^a 2 Crompt. 344. Append. Chap. XLIV.
^g 7.

^b Godb. 44. Append. Chap. XLIV. § 6.

^c Append. Chap. XLIV. § 9, 10.

^d 1 Str. 607.

^e Append. Chap. XLIV. § 2, 3, 4, 5.

^f *Id.* § 6.

^g *Id.* § 12.

^h *Id.* § 13.

ⁱ *Id.* § 14.

^k *Id.* § 15.

the words of the writ, *tam in redditione iudicii, quam in adjudicatione executionis*.¹

The writ of error should regularly agree with the record, in the names and description of the parties, and nature of the cause of action: and therefore, if the parties be mis-named in the writ of error,² or it be sued out by one of several parties only,³ or the party suing in the Exchequer be described as the "*king's debtor*," when in fact he had proceeded on a *capias* of privilege,⁴ it will not operate as a *supersedeas*, or stay of execution. So, if a writ of error be sued out and allowed on a judgment in an action of *covenant*, describing it as a plea of *trespass on the case*, whereupon the record is transcribed, that it seems is no *supersedeas*; although the plaintiff, after notice of the allowance of the writ of error, give a rule to transcribe, and sue out two writs of *scire facias quare executionem non*.⁵

The *teste* of the writ of error is the day of suing it out; and need not be on a seal day.⁶ In the King's Bench, it is returnable *ubicunque*, &c. on the first or last *general* return of the term:⁷ [*1199] In the Exchequer chamber, it is returnable before the justices of the Common bench, and barons of the Exchequer of the degree of the coif, in the Exchequer chamber, on a *particular* return day:⁸ In the House of Lords, when the parliament is sitting, the writ of error is made returnable before the king in his present parliament, *immédiatè*, or without delay; because that court, during the session of it, is supposed to sit continually, and has no vacation, and it is for the honour of that high tribunal to be immediately attended, that they may do the speedier justice:⁹ After a prorogation, the writ of error is returnable before the king in his parliament, at the next *session*;¹⁰ or, after a dissolution, at the next *parliament*, specifying the day when it is to be holden:¹¹ And it is necessary, in all cases, that there should be *fifteen* days between the *teste* and return of a writ of error.[†]

The writ of error being made out, is *sealed* in Chancery, either on a general seal day, or, which is somewhat more expensive, at a private seal; and after being obtained from the cursitor, it should be taken to the clerk of the errors of the court in which the judgment was given,¹² or, in the Exchequer of Pleas, to one of the clerks of the chief baron,¹³ who will *allow* the same, on being paid his fees, and

¹ 2 Str. 1055. Cas. temp. Hardw. 345.

S. C.

² 2 Smith R. 259.

³ *Ante*, 1189, 90.

⁴ 1 Price, 312.

⁵ 5 Taunt. 82.

⁶ 1 New Rep. C. P. 298.

⁷ L. P. E. 33.

⁸ *Id.* 167. Lil. Ent. 213.

⁹ Lil. Ent. 248, 254.

¹⁰ *Id.* 292.

¹¹ 1 Vent. 31. 266. 1 Mod. 106.

¹² R. E. 36 Car. II. K. B. and see R. T. 20 Car. I. K. B.

¹³ R. T. 26 & 27 Geo. II. § 2. in *Scac.* Man. Ex. Append. 209.

† It is not necessary that there should be fifteen days between the *teste* and return of a writ of error. 4 *Barn. & Cres.* 116. 6 *Dowl. & Ryl.* 174. S. C. the constant practice having long been not to pass over more than one return between the *teste* and the return.

make out a certificate or note of the allowance;^a a copy of which should be served on the attorney for the defendant in error: This is usually done at the time of taxing costs, and at the same time, the original certificate should be shewn him. The writ of error *coram nobis* is allowed by the master, in open court;^b and the rule of allowance^c being drawn up by the clerk of the rules, a copy of it is served on the attorney for the defendant in error.

A writ of error, sued out *before* final judgment, continues in force during the whole term in which it is returnable;^d and if final judgment be signed at any time during that term, it is a *supersedeas* or stay of execution, from the time of signing it;^e provided bail, when requisite, be put in thereon, within *four* clear days after final judgment is signed.^f It even seems, that a writ of error may operate as [*1200] a stay of proceedings, though sued out before *interlocutory* judgment.^g And the court of King's Bench have gone so far, that if a writ of error be sued out, and the plaintiff do not sign final judgment till a subsequent term after the return of the writ, in order to avoid the effect of it, and then take out execution; they will set it aside.^h In the Common Pleas, if a writ of error be returnable on the *essoin-day* of the term, the judgment will be removed thereby, provided it be signed at any time afterwards, during the same term.ⁱ And where the plaintiff's attorney, after writ of error brought, artfully delayed signing final judgment till the writ of error was spent; and then brought an action of *debt* upon the judgment, that court ordered the proceedings in the action upon the judgment to be stayed, and a new writ of error to be brought at the plaintiff's attorney's expense.^k But if a writ of error be sued out before final judgment, and the allowance not served until after the writ of error is spent, the plaintiff in that court may afterwards regularly sign final judgment.^l And if the plaintiff, after obtaining a verdict in *ejectment*, sue out a writ of *habere facias possessionem*, without waiting to tax his costs, the defendant's writ of error, we have seen,^m will not operate as a *supersedeas*.

After final judgment, and before execution executed, a writ of error is, generally speaking, a *supersedeas* of execution from the time of its allowance,ⁿ provided bail be put in and perfected in due time;^o and the allowance is notice of itself.^p Or if the plaintiff,

^a Append. Chap. XLIV. § 18.

^b L. P. E. 77. but see 2 Crompt. 394. where it is said, that this writ may be allowed in *vacation*, by the secondary.

^c Append. Chap. XLIV. § 19.

^d Barnes, 196, 7, 8, 5 East, 145. 1 New Rep. C. P. 298.

^e 1 Str. 632. and see 2 Bos. & Pul. 157.

^f 2 Str. 781. 1 Durnf. & East, 279. 4 Durnf. & East, 121. 4 Price, 289.

^g 2 Maule & Sel. 334.

^h *Howston v. Howston*, T. 25 Geo. III. K. B. 1 Durnf. & East, 280. but see 1 Chit. Rep. 124.

ⁱ Barnes, 198.

^j 3 Taunt. 384.

^k *Ante*, 1031, 1089.

^l *Id.* 250.

^m 1 Vent. 31. 1 Salk. 321. Willes, 271.

Barnes, 205. S. C. *Id.* 209. 376. 1 Bur.

340. 1 Durnf. & East, 280. 1 Bos. & Pul.

478. 2 Bos. & Pul. 370. 2 East, 439.

Hague Gent. one, &c. v. —, E. 45

Geo. III. K. B. 5 Taunt. 204. 4 Price, 289.

3 Moore, 83. 1 Gow, 66. S. C. 1 Chit.

Rep. 238. 241. And for the evidence of

the allowance of the writ of error, see 3

Moore 85. 88, 9.

ⁿ 2 Str. 781. 1 Durnf. & East, 279. *Ante*,

574. and see R. E. 36 Car. II. K. B. R. M.

28 Car. II. C. P. 4 Price, 289. 2 Chit.

Rep. 106.

^o 1 Salk. 321. 1 Durnf. & East, 280. 1

Chit. Rep. 238. 241. 3 Moore, 83. 1 Gow,

66. S. C.

before the allowance, have notice of the writ of error being sued out, and delivered to the clerk of the errors, it is from the time of that notice a *supersedeas*.¹ But a writ of error is no *supersedeas* of execution, unless bail in error be put in, and notice thereof given, within the time limited by the rules of the court.² And in order to bring the attorney into contempt, for proceeding after the allowance, he "must have had actual notice." Where the defendant how- [*1201] ever had wilfully concealed the issuing of the writ of error from the plaintiff, the court of King's Bench set aside an execution afterwards issued, without costs, and made the defendant undertake that no action should be brought.³ And where the defendant had applied to a judge in vacation, to set aside the plaintiff's execution for irregularity, on a ground which the judge over-ruled, and afterwards applied to the court to set aside the execution, on the ground that he had before brought a writ of error, the court held, that this fact not having been communicated to the judge on the former application, the defendant was now too late to take advantage of the irregularity.⁴ In the Exchequer of Pleas, a writ of error is a *supersedeas* of execution, from the time of giving notice of the allowance, to the plaintiff in the action, or his attorney or clerk in court.⁵ And it is, generally speaking, so absolutely a *supersedeas*, that after it is allowed, the plaintiff cannot take out a *capias ad satisfaciendum* against the principal, and get it returned *non est inventus*, in order to proceed against the bail;⁶ nor, if the *capias ad satisfaciendum* be sued out before, can the plaintiff call for a return of it, after the allowance of a writ of error;⁷ even though it has previously lain four days in the office;⁸ but in such case, the *capias ad satisfaciendum* may be returned, so as to fix the bail, after the writ of error is determined.⁹

If the defendant bring a writ of error, after which the plaintiff, as he may, bring an action of *debt* on the judgment, and recover, he cannot sue out execution on the second judgment, in the King's Bench, till the writ of error be determined.¹⁰ But where, several years having elapsed after judgment obtained, the plaintiff brought an action upon the judgment, and after judgment signed in that action, the defendant sued out a writ of error upon the first judgment, the court of King's Bench held, that the plaintiff might notwithstanding take out execution on the second judgment.¹¹ So, in the Common Pleas, the plaintiff may take out execution on the second judgment, notwithstanding the writ of error, unless the defendant

¹ 1 Salk. 321. 6 Mod. 130. 2 Ld. Raym. 1260. S. C. Sav. Rep. 51. and see R. F. 36 Car. II. K. B. R. M. 28 Car. II. C. P. Barnes, 205. 209.

² 2 Dowl. & Ry. 85.

³ 1 Salk. 321. 1 Durnf. & East, 280. 1 Bur. 340. Barnes, 376. 1 Gow, 68. n.

⁴ 1 Chit. Rep. 238.

⁵ 2 Barn. & Ald. 373. 1 Chit. Rep. 124. S. C.

⁶ R. T. 26 & 27 Geo. II. in Scar. Man. Ex. Append. 209, 10. 4 Price, 209.

⁷ 2 Str. 867. Fitzgib. 175. 1 Barnard.

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K. B. 334. 2 Ld. Raym. 1567. S. C. and see Barnes, 83. 2 New Rep. C. P. 458.

⁸ 2 Str. 1186. 1 Wils. 16. S. C. 1 East, 662. and see 1 Barn. & Ald. 676. *Ante*, *354.

⁹ 3 Durnf. & East, 390.

¹⁰ 1 Wils. 269. but see Barnes, 83.

contra.

¹¹ 3 Durnf. & East, 643. 4 Bur. 2454. S. P. *Ante*, 576.

¹² 3 Barn. & Ald. 275. and see 1 Str. 526. *accord*.

[*1202] move to stay the proceedings:° And, in that court, the allowance of a writ of error, on a judgment by *nil dicit*, is so entirely a *supersedeas* to a subsequent writ of execution, that if it be sued out and returned pending a writ of error, all proceedings thereon against the bail may be set aside upon motion.[†] In the House of Lords, it has been determined, that taking out execution against the bail below, pending a writ of error in parliament, is a contempt, and breach of privilege.[‡] But when it is apparent to the court, that a writ of error is brought against good faith,[§] or for the mere purpose of delay,^{||} or it is returnable of a term previous to the signing of final judgment,[¶] or bail when requisite is not put in and perfected in due time,[‡] it is not a *supersedeas*.[†] And the court will stay the proceedings, pending a writ of error, on a judgment of *nonsuit*, unless there be some declaration of the party, or his attorney, that the writ of error was brought for delay:[‡] When that is the case, the court, on an affidavit of the circumstances, which in the King's Bench may be sworn before judgment signed,[‡] will permit the plaintiff to take out execution, notwithstanding the writ of error. But the latter court will not permit execution to be taken out, pending a writ of error in parliament, on the ground that the writ of error is brought for delay, merely because the defendant suffered judgment to be affirmed in the Exchequer chamber, without any objection:° And they will not infer that a writ of error was brought for delay, because it was sued out before final judgment signed;[‡] nor can execution be taken out, in the Common Pleas, because the defendant's attorney has declared that the debt would be settled, and that time was all the defendant wanted.[¶] So, leave was refused to take out execution, notwithstanding a writ of error, where it did not appear but that the declaration of the defendant, that he would sue out a writ of error and delay the plaintiff, was made before any action

° Barnes, 202, 3. Willes, 183, 4. *Ante*, 576.

† 2 Blac. Rep. 1183.

‡ 1 P. Wms. 685.

§ 2 Durnf. & East, 183. and see 8 Taunt. 434.

|| 4 Durnf. & East, 436. 2 H. Blac. 30. *Per Cur. E.* 44 Geo. III. K. B. 2 Maule & Sel. 474. 476. 1 Barn. & Cres. 287. *Ante*, 574, 5.

¶ Barnes, 197, 8.

° 2 Durnf. & East, 44.

‡ 5 Durnf. & East, 669. 2 Dowl. & Ry. 208. K. B. *Bishop v. Fry*, T. 2 Geo. IV. C. P. *accord.* but see 1 H. Blac. 432. 4 Durnf. & East, 436. *semb. contra. Ante*, 575.

¶ 4 Maule & Sel. 331.

° 6 Durnf. & East, 400.

‡ 5 East, 145.

¶ 1 New Rep. C. P. 307.

† "Where a party distinctly says he will bring a writ of error for delay, it is very proper, when he has brought the writ of error, and application is made for leave to issue execution, that he should be *put to the test*, whether it is really brought for the purpose of delay, or whether there is real ground of error." *Per* BAYLEY J. 6 Dowl. & Ry. 509. Therefore, where it appeared by affidavit that, after action brought, the defendant threatened to bring a writ of error, and ruin the plaintiff by law proceedings, unless he accepted certain terms of payment, a rule for taking out execution was made absolute. *Id. ibid.*

‡ Inasmuch as a writ of error on a judgment of *nonsuit* can scarcely be brought but for the purpose of delay, the court of C. P., where error is brought on such a judgment, will not stay or set aside an execution, unless some specific error be pointed out by affidavit, 2 Bingh. 326. and see that decision, the court having very fully reviewed the contradictory cases cited by Mr. Tidd.

pending.* And a mere threat of bringing a writ of error for delay, uttered six months before the writ of error sued out, was not deemed sufficient to entitle the plaintiff below to execution, pending the writ of error.†

*An execution, being an *entire thing*, cannot be superseded after it is once begun: Therefore, if a writ of execution be executed before a writ of error allowed or notice, it may be returned afterwards: and the utmost length of time the law allows for executing a writ, is the day whereon it is returnable; and it is not executable any longer that day than the court sits: So long as it is executable, but not executed, the allowance of a writ of error is a *supersedeas*, but not afterwards.† Judgment in a cause was signed on the 30th of *April*, and the plaintiff on that day sued out a writ of *feri facias*: afterwards a writ of error was allowed, and served on the agent in town on the 3d of *May*, and on the plaintiff's attorney in the country and under-sheriff on the 5th of *May*; the sheriff entered on the same day, but after notice of the allowance of the writ of error: No bail in error was put in; and the court of King's Bench upon that ground held, that the writ of error became an absolute nullity, and was no *supersedeas* or stay of execution: But they said, that if the writ of error had been followed up immediately, by the plaintiff in error regularly putting in bail, it would have operated as a *supersedeas*. The party therefore taking out execution, after the allowance of a writ of error, and before bail put in, does it at his peril; for if the writ of error be regularly followed up by bail, the execution will be set aside.‡

I shall next proceed to inquire, in what cases *bail* is requisite on a writ of error; and when, where, and how it should be put in, excepted to, and justified. No bail in error was required at common law; so that the defendant, by bringing a writ of error, might have delayed the plaintiff of his execution, without giving any security, either for the prosecution of such writ, or for the payment of the debt or damages recovered by the former judgment, in case it should be affirmed, or the writ of error should be discontinued,

* 4 Maule & Sel. 331. 6 Moore, 45. *Ante*, Willes, 271. Barnes, 205. S. C. 3 Moore, 574, 5.

† 7 Taunt. 537. 1 Moore, 253. S. C.

‡ 2 Durnf. & East, 45.

§ 1 Salk. 321. and see 1 Vent. 255.

† Though the court have interfered, where the party making the admission of delay was the party who sued out the writ, they will not interfere in other cases. Therefore, if one of many defendants who have severed in defence, sues out a writ of error, the plaintiff cannot proceed to execution, because one of the other defendants makes an admission that the writ was sued out for delay. 2 Bingham 304. C. B. The rule appears different in the K. B., for in a case wherein one of many plaintiffs having brought a writ of error, and another of them having admitted it was for delay, the court required an affidavit that there was real error. *Ellis v. Sweet*, cited *ibid.* E. T. 1824. But this practice of the latter court was disapproved of by the judges of the C. P., as calling for affidavits to support a writ of right.

or the plaintiff in error nonsuited therein. The inconvenience of this was very early felt; and in order to guard against it, the court of King's Bench, so long ago as in the reign of *Henry the seventh*,^{*} would not allow a writ of error in parliament, until some error was shewn to them in the record, lest it should be brought on purpose to delay execution: And, with a like view, it was ordered by the justices of the Common Pleas, in the reign of Queen *Elizabeth*, that [*1204] "the clerk *of the treasury for the time being should not make a *supersedeas* upon any writ of error, to reverse or affirm any judgment given in that court, upon any verdict, demurrer in law or confession, until some manifest or pregnant error therein should be notified by the party that sued the writ of error, or some of his counsel, unto the justices of the bench, or to one of them at the least."[†]

And, still further to avoid unnecessary delays of executions, it is enacted by the statute 3 *Jac. I.* c. 8. (made perpetual by 3 *Car. I.* c. 4. § 4.) that "no execution shall be stayed or delayed, upon or by any writ of error, or *supersedeas* thereupon to be sued, for the reversing of any judgment in any action or bill of *debt*, upon any *single bond* for debt, or upon any obligation with condition for the *payment of money only*, or upon any action or bill of *debt* for *rent*, or upon any *contract*, sued in any of the courts of record at *Westminster*, or in the counties palatine of *Chester*, *Lancaster*, or *Durham*, or the courts of great sessions in *Wales*; nor (by the 19 *Geo. III.* c. 70.) for the reversing of any judgment given in any *inferior* court of record, where the *damages*² are under *ten* pounds, (since extended to *fifteen* pounds, by the statute 51 *Geo. III.* c. 124. § 3.) unless the person or persons in whose name or names such writ of error shall be brought, with two sufficient sureties, such as the court wherein the judgment is given shall allow of, shall first be bound unto the party for whom the judgment is given, by recognizance to be acknowledged in the same court, in double the sum adjudged to be recovered by the former judgment, to prosecute the said writ of error with effect, and also to satisfy and pay, if the said judgment be affirmed, or the writ of error nonprosessed, all and singular the debts damages and costs adjudged upon the former judgment, and all costs and damages to be awarded for the delaying of execution."

This statute is confined to the particular actions enumerated therein; and does not extend to actions on the *case* upon bills of exchange,³ &c.; but it extends, in the actions specified, to all manner of judgments, whether by default, upon demurrer, or *nul tiel record*,

^{*} 1 Hen. VII. 19. 1 Vent. 266.

[†] R. E. 23 Eliz. C. P. and see R. M. 6 & 7 Eliz. C. P. 2 Wils. 144. but see 3 Durnf. & East, 78. 3 Dowl. & Ry. 233, 4. If this rule were still acted under, and some such rule were made in the King's Bench, or if the defendant, upon suing out a writ of error, were obliged to bring the debt and costs into court, it might have a tendency to prevent the

practice, that too often prevails, of bringing writs of error for the mere purpose of delay.

² *Qu.* as to the *damages* here referred to; whether they are the damages laid in the declaration, or the damages recovered; and if the latter, whether they are with or without costs?

³ 2 Keb. 234.

as well as after verdict. In actions of *debt* on bond, conditioned *for the payment of *money only*, the statute has been construed to extend, not only to cases where the sum was originally certain, and payable absolutely by the condition, without referring to any other instrument, but also to cases where the sum was originally uncertain, but afterwards reduced to a certainty; as *debt* on bond, conditioned for the payment of so much money as J. S. should declare to be due on an account;^b or on a bottomree bond, by which the money was payable upon a contingency, which has happened;^c or where the bond was conditioned for the payment of a sum of money mentioned in certain indentures,^d &c. And in *debt* for the non-payment of mortgage money, it is clear that the mortgage deed containing a covenant for repayment of the money, is a *contract*, upon which bail in error is necessary, within the meaning of the statute.^e

But the statute does not extend to actions of *debt* on bond, conditioned for the performance of *covenants*,^f or of an *award*, &c. even though one of the covenants be for the payment of money, and the action be brought for the non-performance of that covenant.^g And bail in error is not necessary in *debt* on bond, conditioned for the payment of money, and also for performing the covenants in a mortgage deed.^h So, a bond conditioned to keep the plaintiff harmless from the payment of an annuity, and from all actions, suits, damages and costs, which should be brought against him, or that he might sustain by reason of the non-payment thereof, is not a bond for the payment of money only, within the meaning of the above statute; and consequently, upon error brought to reverse a judgment obtained in an action on such bond, bail in error are not required.ⁱ In an action of *debt* on bond conditioned for the performance of covenants, if the defendant let judgment go by default, without craving *oyer* of the condition, and after bring a writ of error, it is said that, in the King's Bench, he must put in bail thereon; because it does not appear to the court upon the record, that the condition was for performance of covenants.^k But, in the Common Pleas, the matter of bail is examinable by the court; and they will inspect the condition of the bond, in order to see whether or not it is for the payment of money.^l In *debt* on a general bond of indemnity, bail is not required, on *bringing a writ of error after judgment by default: But where a man having entered into bond as surety for another, to pay a sum of money to a third person, took a counter-bond for payment of the money, by way of indemnity, the court of Common Pleas held this to be a case within the statute, and consequently that bail in error was necessary.^m

^b 1 Lev. 117. 1 Keb. 613. S. C.

^c 1 Str. 476. and see 6 Mod. 38. but see 1 Show. 14. Comb. 105. S. C. 7 Durnf. & East, 450.

^d 2 Str. 959. 2 Barnard. K. B. 382. Kelynge, 181. S. C. Barnes, 78. 98.

^e 3 Taunt. 383.

^f 2 Bulst. 54.

^g Carth. 28. 1 Show. 14. S. C. 2 Keb.

131. S. P.

^h 10 East, 407.

ⁱ 1 Barn. & Cres. 316. 2 Dowl. & RyL 549. S. C.

^k 2 Crompt. 363.

^l Barnes, 72. Pr. Reg. 184. and see Cas. Pr. C. P. 7.

^m Com. Rep. 321, 2. 10 Mod. 281. K. B. *contra*.

The condition of a bond was to pay for so much beer as the obligee should deliver to J. S. not exceeding 100*l.*; and after judgment upon demurrer, the court of King's Bench held that no bail was requisite.^a But, in a subsequent case,^b where a bond was given by a third person, as collateral security for a debtor's paying his creditors *fifteen* shillings in the pound, upon the liquidated amount of his debts, the court held this to be a bond with condition for the payment of money only; and that its being paid by instalments made no difference. In the former case, the court seem to have considered the statute as introductive of a new law, in restraint of the remedy by writ of error; and therefore, that it should be construed strictly, and not extended by equity to cases out of the letter of it: But in the latter case, they appear to have holden, that the statute is of a remedial nature and ought to receive a liberal construction, for the benefit of the party whose execution would otherwise be stayed by the writ of error, and particularly as writs of error are frequently brought for the mere purpose of delay.

In actions upon *contracts*, the statute is confined to cases where there was originally a specific contract for a sum certain; and it does not extend to actions of *debt* on a promissory note,^c or against the acceptor of a bill of exchange,^d or on the common counts for work and labour, and goods sold and delivered,^e &c. or upon an account stated;^f nor to an action of *debt* upon an award, where the arbitrators have directed several controversies to be settled by the payment of one sum.^g Neither, for a similar reason, is bail in error required in an action of *debt* on judgment;^h nor in an action of *debt* upon a bail-bond,ⁱ or recognizance of bail;^j nor upon an award of execution, on a recognizance of bail in error,^k or for subsequent [*1307] arrears of an annuity, on the statute 8 & 9 W. III. c. 11. § 8.^l And it seems, that if there be one count in the declaration, on which judgment is entered, on a cause of action for which *debt* would not lie at the time of the statute of *James*, no bail in error is required.^m But if judgment be affirmed on a writ of error, in the King's Bench,ⁿ or Exchequer chamber,^o new bail must be given, on bringing a writ of error in parliament: for the first recognizance does not include the costs to be assessed in the House of Lords, and therefore a new recognizance must be given, within the intent of the statute; and it is not the business of the court where the judgment is affirmed, to examine whether bail was put in upon the first writ, for the want of that does not hinder the prosecution of the writ of error, but only makes it no *supersedeas*.^p

^a 2 Str. 1190. 1 Wils. 19. S. C.

^b 2 Bur. 746.

^c 2 East, 359.

^d 1 Taunt. 540.

^e 1 Bos. & Pul. 249. 1 Taunt. 540.

^f Yelv. 227. 2 Bulst. 53. S. C. 1 Lev.

117. 1 Show. 15. S. C. cited. 3 Salk.

147. 7 Durnf. & East, 449. 2 East, 359. 1 Taunt. 540, 41.

^g 3 Bur. 1548. 1 Blac. Rep. 506. S. C. 9 Price, 1. S. P. on a judgment recovered

after verdict, in *Ireland*.

^h Cas. Pr. C. P. 7.

ⁱ 3 Bur. 1566. 8 East, 240. but see 2 Blac. Rep. 1227.

^j Barnes, 194, 5.

^k 1 Taunt. 168.

^l 2 East, 359. 1 Taunt. 540.

^m 1 Salk. 97. 2 Ld. Raym. 840. 7 Mod. 120. S. C.

ⁿ 1 Str. 537.

^o 1 Salk. 97.

The before-mentioned statute was extended to other actions, by the 13 *Car. II. stat. 2. c. 2. § 9.* by which it is enacted, that "no execution shall be stayed, in any of the courts mentioned in the statute 3 *Jac. I.* by any writ or writs of error, or *supersedeas* thereupon, *after verdict and judgment*, in any action of debt grounded upon the statute 2 & 3 *Edw. VI. c. 13.* for not setting forth tithes, nor in any action upon the case, upon any promise for payment of money, actions *sur trover*, actions of covenant, detinue, and trespass, unless such recognizance, and in such manner, as by the former act is directed, shall be first acknowledged in the court where the judgment is given."

And, by the 16 & 17 *Car. II. c. 8. § 3.* (made perpetual by the 22 & 23 *Car. II. c. 4.*) "no execution shall be stayed, in any of the last-mentioned courts, by writ of error or *supersedeas* thereupon, *after verdict and judgment, in any action personal whatsoever*, unless a recognizance, with condition according to the statute 3 *Jac. I.* shall be first acknowledged in the court where such judgment shall be given. And further, that in writs of error to be brought upon any judgment after verdict, in any writ of *dower*, or in any action of *ejectione firmæ*, no execution shall be stayed, unless the plaintiff or plaintiffs in such writ of error shall be bound unto the plaintiff in such writ of *dower*, or action of *ejectione firmæ*, in such reasonable sum as the court to which such writ of error shall be directed shall think fit, with condition, that if the judgment shall be affirmed, or the writ of error discontinued; in default of the plaintiff or plaintiffs therein, or the said plaintiff or *plaintiffs be [*1208] nonsuited in such writ of error, that then the said plaintiff or plaintiffs shall pay such costs, damages, and sum and sums of money, as shall be awarded upon or after such judgment affirmed, discontinuance, or nonsuit."

And, to the end that the same sum and sums and damages may be ascertained, it is further enacted, that "the court wherein such execution ought to be granted, upon such affirmation, discontinuance, or nonsuit, shall issue a writ to inquire as well of the mesne profits, as of the damages by any waste committed after the first judgment in *dower*, or in *ejectione firmæ*; and upon the return thereof, judgment shall be given and execution awarded, for such mesne profits and damages, and also for costs of suit."

The two last-mentioned statutes are confined to judgments after *verdict*; and do not extend, like the former, to judgments by default, upon demurrer, or *nul tiel record*: Therefore, upon these latter judgments, a writ of error is a *supersedeas* without bail, in such actions as are not enumerated in 3 *Jac. I.* But it has been determined, that a *scire facias* against bail is a *personal* action, within the 16 & 17 *Car. II. c. 8.*^f In this latter statute there is a *proviso*, that "it shall not extend to any writ of error to be brought by any *executor or administrator*; nor unto any action popular, or other action brought upon any penal law or statute, except actions of *debt* for not setting forth tithes; nor to any indictment, presentment,

inquisition, information, or appeal." It has however been determined, that if judgment be given against an executor or administrator *de bonis propriis*, he shall put in bail, in cases where it would be required of other persons;⁵ and though an executor or administrator be not compellable to give bail in error, yet if he do, the court may take it, and the recognizance will be binding.^h

In *ejectment*, by landlord against tenant, on the statute 1 Geo. IV. c. 87. where a recognizance shall have been entered into; pursuant to the provisions of that act, not to commit any waste, &c. it is provided, that "such recognizance shall immediately stand discharged and be of no effect, in case a writ of error shall be brought upon such judgment, and the plaintiff in such writ shall become bound, with two sufficient sureties, unto the defendant in the same, in such sum, and with such condition, as may be conformable to the provisions respectively made for staying execution, on bringing writs of error upon judgments in actions of *ejectment*, by an act passed [*1209] in *England*, in the sixteenth and seventeenth years of the reign of king *Charles* the second, and by an act passed in *Ireland*, in the seventeenth and eighteenth years of the reign of the same king, which acts are respectively intituled, *An act to prevent arrests of judgment, and superseding executions.*"

The statutes requiring bail in error seem to be confined to cases where judgment has been given for the original *plaintiff*; and not to apply to judgments given for the *defendant* below:ⁱ it being holden that a person who is *plaintiff* both below and above, need not give bail in error.^k It has also been determined, that they do not extend to the writ of error *coram nobis*,^l or *vobis*: which is or is not a *supersedeas* of execution, according to circumstances.^m In general, when a writ of error *abates* by the act of God, as by the death of the parties,ⁿ or chief-justice,^o or by the act of law, a second writ of error is a *supersedeas* of itself, without motion or leave of the court: And it is said, that if a writ of error be brought in the same court, after abatement or discontinuance of a writ of error *coram nobis* or *vobis*, no bail is requisite; because none was required on the former writ of error.^p But this must be understood, where the second writ of error is brought after an abatement by the act of God, or of the law; for when a writ of error is quashed in the King's Bench for insufficiency, a writ of error *coram nobis* is not a *supersedeas* of itself.^q In such case, however, the court on motion will order, that upon the plaintiff in error putting in and justifying bail within *four* days, further proceedings shall be stayed on the judgment in the original action, until the writ of error be determined;^r which is also the course upon a writ of error *coram nobis*, for error in fact: And a like order was made, where a second writ of error

⁵ 1 Lev. 245. 1 Sid. 368. 2 Keb. 295.
371. S. C.

^h 2 Str. 745. 2 Ld. Raym. 1459. S. C.

ⁱ 4 Mod. 7, 8. 5 East, 545. 10 East, 2.

^k 1 Dowl. & Ry. 184.

^l 2 Crompt. 394.

^m 8 East, 415.

ⁿ Latch, 57, 8. 1 Vent. 353.

^o 1 Keb. 668. 686. but see Barnes, 201.

Prac. Reg. 195. S. C.

^p 2 Crompt. 396.

^q Carth. 368, 9. 1 Ld. Raym. 151. S. C.

2 Ld. Raym. 1404. 1 Str. 607. S. C. and see 2 Str. 949. 8 East, 412.

was quashed for insufficiency: for such second writ being void, was as if there had been none before.^r But when a writ of error abates by the act or default of the party, a second writ of error, brought in the same court, is not a *supersedeas* of execution, as the first is;^s as where the plaintiff in error marries,^t or nonprosses his own writ of error:^u and execution may be sued out in these cases, without leave of the court:^x but ^{*}it seems, that on a writ of error *coram* [*1210] *nobis* or *vobis*, execution taken out without leave of the court is irregular.^y

When bail is required upon a writ of error, it should be put in within *four* days after the delivery of the writ to the clerk of the errors, if it be sued out *after* final judgment;^z or if it be sued out *before*, the bail shall be put in within *four* days after final judgment is signed;^a otherwise the party succeeding in the original action may take out execution, notwithstanding the writ of error.^b And, after the allowance of a writ of error, if bail be not put in thereon in due time, it will be a nullity; though the defendant in error has previously sued out execution.^c The *four* days in this case are to be reckoned from the time when the taxation is completed, by the insertion of the amount of the costs:^d And, in the Common Pleas, there is no occasion for a certificate from the clerk of the errors, that no bail is put in.^e The bail is put in with the clerk of the errors, who attends to take their acknowledgment, in the court wherein the judgment was given, or before a judge of that court; and it seems that they cannot be put in before a commissioner in the country.^f In the King's Bench, the same persons who were bail in the original action, may become bail in error, if they are able to justify:^g And, in the Common Pleas, a recognizance entered into by the bail in error, without the principal, is good.^h But if a defendant bring a writ of error, and put in hired bail, who are insolvent, the plaintiff may, without entering an exception, treat them as a nullity, and issue execution.ⁱ

In *personal* actions, it is a rule, founded upon the statute 3 Jac. I. that the recognizance should be acknowledged in *double* the sum adjudged to be recovered by the former judgment:^k And a recognizance of bail in error, for less than double the sum recovered by the judgment, does not operate as a *supersedeas*, or stay of execution.^l But upon error in *debt* on bond, though the bail are to be bound in double the penalty recovered, yet by the course of the court of King's

^r Carth. 370.

^s Latch, 57. 8. 1 Vent. 353. 1 Mod. 285.

1 Salk. 263. 8 East, 412.

^t 2 Str. 880. 1015. 8 East, 414.

^u 1 Cropp. 350. 8 East, 412.

^x 8 East, 412.

^y Say. Rep. 166. 8 East, 415. 16. Barnes, 201. 2 Blac. Rep. 1067. *Ante*, 1034.

^z R. E. 36 Cor. II. K. B. R. T. & M. 28 Cor. II. C. P. 1 Bos. & Pul. 478. By a former rule of E. 16 Cor. II. K. B. the plaintiff in error, in the King's Bench, had *four* days to put in bail, after the allowance of the writ of error.

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^a 2 Str. 781. 1 Durnf. & East, 279. 4

Durnf. & East, 121. 1 Bos. & Pul. 478.

^b 2 Durnf. & East, 44.

^c 2 Chit. Rep. 106.

^d 5 Taunt. 672. 1 Marsh. 278. S. C. and see 1 Bing. 233.

^e Barnes, 212.

^f *Id.* 78.

^g 8 Durnf. & East, 639.

^h 2 Bos. & Pul. 443.

ⁱ 1 Barn. & Cres. 268. 2 Dowl. & Ryl. 421. S. C.

^k 2 Chit. Rep. 105.

^l 5 Taunt. 320.

[*1211] Bench, it is sufficient if they justify in double what is really due:^m And, in the Common Pleas, if the bail are bound in double the sum secured by the condition, it is sufficient; though a further sum be due for interest and costs, and nominal damages have been recovered.ⁿ In the Exchequer, it is a rule,^o that "in all cases where special bail is required on writs of error, if the bail are obliged to justify, each of them shall justify himself in double the sum recovered by the judgment on which the writ of error is brought; except where the penalty of a bond or other specialty, is recovered by such judgment, in which case, each of the bail shall justify in such penalty only; and also except in cases of *ejectment*, where, if bail shall be put in upon the writ of error, each of such bail shall justify in double the improved annual rent or value of the premises recovered."

In *ejectment*, the plaintiff in error may either enter into a recognizance himself, without any bail,^p pursuant to the statute 16 & 17 Car. II. c. 8. § 3.^q or he may procure *two* responsible persons to become bail: For though the words of the statute seem to require a recognizance by the plaintiff in error, yet in the construction of this statute, it is deemed sufficient, if he procure proper sureties to become bound for him:^r And one reason for this construction seems to be, that an *infant* plaintiff could not enter into such recognizance, nor a plaintiff who had become a *feme covert* after the action brought; and as the legislature could not have meant to exclude *infants* and *feme coverts* from the benefit of the act, they must put such a construction upon it as would apply to all plaintiffs in error.^s Besides, bail in error cannot be taken by a commissioner in the country;^t and it would be very hard to oblige a plaintiff in error, who may live at a great distance from *London*, to come into court, to enter into a recognizance: And this construction may in some cases give the defendant in error a better security than he could have had, if the plaintiff alone were to become bound.^u

[*1212] In the King's Bench, the practice is said to be, for the plaintiff in error, or his bail, to enter into a recognizance, in *double* the improved rent, or yearly value of the premises, and *single* amount of the costs.^v In the Common Pleas, the clerk of the errors governs himself, in fixing the penalty of the recognizance, by the

^m 2 Str. 821. The rule, as laid down by the court of King's Bench, in H. 25 Geo. III. was, that the bail should justify in the penalty, and not in double the sum due: and this agrees with what is laid down in 1 Wils. 213. and see 2 Chit. Rep. 105.

ⁿ 2 Bos. & Pul. 443.

^o R. E. 33 Geo. II. in *Seac. Man. Ex. Append.* 217. And for the time and manner of putting in, excepting to, and justifying bail in error, in the Exchequer of Pleas, see R. T. 26 & 27 Geo. II. § 2. in *Seac. Man. Ex. Append.* 209, 10.

^p *Per Cur.* T. 21 Geo. III. K. B.

^q *Ibid.* 1207, 8.

^r Carth. 121. Barnes, 75. Cas. Pr. C. P. 142. Pr. Reg. 179. S. C. Barnes, 78. Cas. Pr. C. P. 152. Pr. Reg. 180. S. C. Barnes, 212. 2 Bos. & Pul. 443, 4. 8 East, 298.

^s 8 East, 299.

^t Barnes, 78. Cas. Pr. C. P. 152. Pr. Reg. 180. S. C. *Ante*, 1210.

^u 8 East, 298. and see *Cas. temp. Hardw.* 374. But in the case of *Thomas v. Goodtitle*, 4 Bur. 2502. the recognizance it seems was taken in double the rent only, without the addition of costs: and, in a subsequent case, the court said, "It is sufficient that the plaintiff in error be bound in a recognizance for two years' rent." *Per Cur.* T. 21 Geo. III. K. B.

amount of the rent of the premises; and takes the recognizance in *two years' rent or profits, and double costs*:^a And where the plaintiff in error enters into the recognizance, it is not necessary for him, in that court, to give the defendant in error notice thereof;^b nor can he be examined, in the King's Bench, as to his sufficiency:^c though, when bail in error is put in, notice thereof should it seems be given, and they may be examined,^d as in other cases. In the Exchequer, we have seen,^e the bail must justify in double the improved annual rent, or value of the premises recovered. But bail in error are not chargeable for the mesne profits, in an action upon the recognizance, until they have been ascertained by writ of inquiry, pursuant to the statute 16 & 17 *Car. II. c. 8. § 3*.^b

The condition of the recognizance in the Common Pleas, on a writ of error returnable in the King's Bench, is, according to the direction of the statute 3 *Jac. I.* that the plaintiff shall prosecute his writ of error with effect; and, if judgment be affirmed, shall satisfy and pay the debt, damages and costs recovered, together with such costs and damages as shall be awarded by reason of the delay of execution, or else that they (the bail,) shall do it for him.^c On a writ of error returnable in the Exchequer chamber, the form of the recognizance is somewhat different; the bail engaging to pay the sum recovered by the judgment, and such further costs of suit, sum and sums of money, as shall be awarded for delay of execution.^d And as the engagement of the bail is absolute, it has been determined, that they cannot surrender the plaintiff in error:^e nor are they entitled to relief, when he becomes bankrupt whilst the writ of error is **pending*:^f So if the bail become bankrupt, pending the [*1213] writ of error, and before affirmance, they are not discharged from their recognizance; for till then the debt is contingent, and not proveable under the commission.^g

When bail is put in, notice thereof should be given without delay to the defendant in error, or his attorney;^h and in general if the defendant in error do not except to the bail for insufficiency, within *twenty days* next after such notice, the recognizance shall be allowed.ⁱ But if the defendant bring a writ of error, and put in hired bail, who are insolvent, the plaintiff, we have seen,^k may, without entering an exception, treat the bail as a nullity, and issue execution. If the bail be not approved of, the defendant in error may, at any time within the *twenty days*, obtain a rule from the clerk of the

^a 7 Taunt. 428. 1 Moore, 119, 20. S. C. and see Barnes, 103. *accord*.

^b 7 Taunt. 427. 1 Moore, 118. S. C.

^c 8 East, 299. ^d *Ante*, 1211.

^e 1 Maule & Sel. 247. and see Cas. temp. Hardw. 374. 2 H. Blac. 286, 7.

^f Append. Chap. XLIV. § 24. And for a recognizance of bail, on error *coram nobis*, see *id.* § 20.

^g Append. Chap. XLIV. § 25. 2 Durnf. & East, 59. And for the form of an entry of recognizance of bail, on error from the court of Exchequer, see Append. Chap. XLIV. § 26, 7.

^h R. M. 5 W. & M. (b.) K. B.

ⁱ 1 Durnf. & East, 624. and see 2 Bos. & Pul. 440. where it was holden, that the bail in error are not discharged, by taking their principal in execution.

^j 2 Str. 1043. Cas. temp. Hardw. 262. S. C.

^k 2 Dowl. & Ryl. 85. *Ante*, 1200, 1201. Append. Chap. XLIV. § 21.

^l R. M. 5 W. & M. K. B. R. M. 6 Geo. II. reg. 6. C. P. and see R. T. 26 & 27 Geo. II. § 2. in *Soc. Man. Ex. Append.* 210. *accord*.

^m *Ante*, 1210.

errors, for better bail;¹ a copy of which should be served on the attorney for the plaintiff in error: And if the bail do not justify, or other bail be not put in and justified, within *four* days after notice of the rule in *term* time, they are considered as a nullity;² and the party succeeding in the original action may take out execution.³ In the King's Bench, time is never allowed to justify bail in error;⁴ and the same practice has prevailed in the Common Pleas, unless some real error be shewn.⁵ But the writ of error still remains, and may be proceeded in; the *supersedeas* to the execution only being taken away.⁶ In the King's Bench, if a rule for better bail be served in *vacation*, there is it seems no occasion to justify until the next term: but the plaintiff in error must either give notice of justifying the *same* bail, or put in such other bail as he will abide by, within the four days allowed by the rule; it having been determined, that he cannot give notice of fresh bail after the four days, unless indeed the bail already put in are prevented from justifying by special circumstances, which must be disclosed to the court by affidavit, at the time appointed for justifying.⁷ In the Common Pleas, [*1214] when the rule is served in *vacation*, *the plaintiff in error has not time of course to perfect his bail until the next term; but ought to justify before a judge; and if the defendant in error be not satisfied with that, then the plaintiff in error, having done every thing in his power, is entitled to time for justifying until the next term, but not otherwise.⁸ In the Exchequer of Pleas, it is a rule,⁹ that "if bail in error shall be excepted to, and notice of exception given in writing to the attorney or clerk in court for the plaintiff in error in *term* time, such bail shall be perfected and justified within *four* days after notice so given, or the defendant in error may, in default thereof, proceed to execution, notwithstanding such writ of error; but where notice of exception shall be given in *vacation* time, then such bail shall be perfected and justified upon the *first* day of the subsequent term, unless the defendant in error, his attorney or clerk in court, shall consent to a justification before one of the barons; in which case, such bail shall justify themselves before a baron, within *four* days after notice of such exception given in writing to the plaintiff in error, his attorney or clerk in court: and in default of such justification, the defendant in error may proceed to execution, notwithstanding such writ of error."

The mode of adding and justifying bail in error, is the same as in the original action:¹⁰ And if a person excepted to as bail in error

¹ Append. Chap. XLIV. § 22.

² 7 East, 580.

³ R. M. 5 W. & M. (b.) K. B. R. M. 6 Geo. II. reg. 6. C. P.

⁴ *Per Bayley*, J. E. 55 Geo. III. K. B. 1 Chit. Rep. 76. (a.) but see 8 Taunt. 126.

⁵ Dowl. & Ry. 9. *Ante*, *298.

⁶ 2 Wils. 144.

⁷ 1 Salk. 97. 2 Ld. Raym. 840. 7 Mod. 120. S. C.

⁸ 1 Maule & Sel. 366. *Ostreich and an-*

other, v. *Wilson*, *id.* 367. (a.) *accord*. *Hinchley v. Hutton*, H. 27 Geo. III. K. B. *id.* 368. (a.) *contra*. and see 2 Chit. Rep. 84, 5.

⁹ *Barnes*, 211. 2 Blac. Rep. 1064. Imp. C. P. 6 Ed. 729.

¹⁰ R. T. 26 & 27 Geo. II. § 2. in *Scac. Man. Ex. Append.* 210.

¹¹ For the form of notice of justification, see Append. Chap. XLIV. § 23.

do not justify, his name may be struck out of the recognizance.^a But where bail in error was put in in vacation, and excepted to, and the plaintiff in error gave notice that they would justify on the first day of the next term, and before that day *non-prossed* his own writ of error, and the bail did not justify; the court held, that they were not entitled to stay proceedings in an action against them upon the recognizance, nor to have an *exoneretur* entered on the bail-piece.^b

Bail in error, when necessary, being complete, the next step to be taken by the plaintiff in error, except on a writ of error *coram nobis* or *vobis*, is to *certify* or transcribe the record; in order to which, a transcript should be made, and sent with the writ of error and return, into the court above. When no bail is required, this is the first step that is taken, after the service of the allowance of the writ of error. And the plaintiff in error should regularly cause the transcript to be made, (for the *defendant* cannot transcribe the record,^c) by the time ^athe writ of error is returnable. If [^a1216] the record be not certified by that time, the defendant in error may give the plaintiff a *rule* to certify it;^a which is an *eight* day rule, obtained from the clerk of the errors in the Common Pleas, on a writ of error from that court returnable in the King's Bench; or from the clerk of the errors in the King's Bench, on a writ of error returnable in the Exchequer Chamber, or House of Lords; and when obtained, a copy of it should be forthwith made, and served on the attorney for the plaintiff in error:^b In the Common Pleas, the rule to transcribe may be served on the plaintiff in error; these rules being excepted out of the general practice, which requires service on his attorney.^c

In the King's Bench, on a writ of error to the Exchequer Chamber, if the writ be returnable the first return of the term, this rule may be had on the *essoin* day.^d In the House of Lords, there is an order, that "upon writs of error, all persons shall bring in their writs, within *fourteen* days after the first day of the session in which such writs shall be returnable, otherwise they shall not be received; unless upon judgments given during the session, upon which the writs shall be brought in within *fourteen* days after judgment given:^e And till the expiration of the time limited for bringing in the writ of error, the defendant in error cannot have execution.^f

On a writ of error brought on a judgment in the Common Pleas, or any inferior court, in an adverse suit, the record itself is supposed to be removed, that it may remain as a precedent and evidence of the law in similar cases.^g But in the case of a fine, the transcript only is

^a Say. Rep. 58. 1 Wils. 337. S. C.

^b 2 Maule & Sel. 210.

^c 1 Wils. 35.

^d Cas. temp. Hardw. 352. Append.

Chap. XLIV. § 29, 30.

^e L. P. E. 33.

^f Barnes, 410.

^g *Id. ibid.*

^h Com. Rep. 420, 21.

ⁱ *Id. ibid.* Bunb. 64. 69.

^j 2 Bac. Abr. 202. F. N. B. 20. 1 Hen. VII. 20. 2 Salk. 565.

removed from the Common Pleas; for a fine is but a more solemn acknowledgement or contract of the parties, and is therefore no memorial of the law, and need only be affirmed or vacated: If it be affirmed, the contract stands as it was; if vacated, the justices of the King's Bench may send for the fine itself, and reverse it; or they may send a writ to the treasurer and chamberlain, to take it off the file.^b Besides, should the record itself be removed, and the fine affirmed, it could not be engrossed, for want of a Chirographer, in the King's Bench.^c This distinction, however, is not attended to in practice; for on all writs of error returnable in the King's Bench,^d [*1216] as well as in the Exchequer Chamber,^e or House of Lords,^f it is usual to send only a transcript of the record, and not the record itself.

In an *inferior* court, on a writ of error returnable in the King's Bench, the plaintiff in error, upon service of the rule to certify the record, should bespeak the transcript of the proper officer below, and carry the same into the office of signer of the writs of the King's Bench, (a part of whose business it is to receive and deliver out writs of error, and *certiorari*, &c.) and there file it, before the second seal; otherwise the defendant in error may apply, and get a certificate from the office, that the writ of error is not returned, and the transcript brought in; and may thereupon apply to the cursitor, for a writ *de executione judicii*, directed to the judges of the court below, commanding them that they proceed to execution on the judgment, notwithstanding the writ of error.^g

In the King's Bench and Common Pleas, the transcript is made by the clerk of the errors, who acts as clerk to the chief-justice; and in order to enable him to make it, the defendant in error should leave with him the record, or copy of the proceedings; upon which he sends for the transcript money, or a part of it, to the plaintiff in error; and if paid, he proceeds to make the transcript, which is examined with the record by the attorney for the defendant in error.^h In the King's Bench, on a writ of error to the Exchequer Chamber, if the writ be returnable on the first return day of the term, the clerk of the errors takes the whole of that term to make the transcript; if on the last return day, he takes all the vacation following.ⁱ In the Common Pleas, it is usual for the chief-justice to sign the return;^j but this does not seem to be absolutely necessary: At least, the court of King's Bench will not stay the proceedings, for want of his signature. And though the writ of error requires the record to be sent *sub sigillo*, yet this is never practised.^k

The transcript being made, examined and paid for, is delivered over, with the writ of error and return,^l by the clerk of the errors in the Common Pleas, to the signer of the writs in the King's Bench;

^b 1 Salk. 337, 8. 341.

^c 2 Bac. Abr. 203.

^d E. M. 28 Car. II. C. P. Harris. Prac. C. P. 434. 2 Salk. 565. 5 Taunt. 85.

^e 2 Str. 837.

^f 1 Hen. VII. 19, 20. Dyer, 378. Cro. Jac. 341, 2. 2 Bulst. 163, 4. S. C. T.

Raym. 5.

^g 2 Crompt. 345. 3 Salk. 146.

^h L. P. E. 34, 5. ⁱ Id. 35.

^j 1 Sid. 268. Barnes, 201.

^k 2 Str. 1063, 4. Cas. temp. Hardw. 344.

S. C.

^l Append. Chap. XLIV. § 31, 2.

or by the clerk of the errors of the King's Bench, to the clerk of the errors in the Exchequer Chamber, or his deputy.¹ If a writ of error be brought in parliament, on a judgment in the King's Bench, the *chief-justice goes in person, attended by the clerk of the [*1217] errors, to the House of Lords, with the record itself, and a transcript, which is examined and left there; and then the record is brought back again into the King's Bench; and if the judgment be affirmed, that court may proceed on the record to grant execution: for if the record itself should be removed, and judgment affirmed, and the parliament dissolved, there could not be any proceedings thereupon to have execution.²

On a writ of error from the Common Pleas, the chief-justice certifies only the body of the record, which is all that remains in his custody; for original and judicial writs remain with the *custos brevium*, and other officers, and are never certified, but when error is assigned for want of them.³ If the record be not certified in due time, the defendant in error may sign a *nonpros*;⁴ but no costs are allowed thereon.⁵ Or the plaintiff may *nonpros* his own writ, without carrying over the transcript to the court of error; and by that means avoid the payment of costs.⁶ And, in the Common Pleas, the defendant in error cannot take out execution, without a certificate in writing from the clerk of the errors, that the plaintiff in error has made default in transcribing the record into the King's Bench.⁷ The bail, in the Common Pleas, being bound to prosecute the writ of error with effect, will be liable, though the record should not be transcribed.⁸

All the proceedings which have been hitherto mentioned, are in the court *below*, where the judgment was given; but from henceforth they are in the court *above*; to which they are removed: And accordingly, after a writ of error is brought and allowed, the names of the plaintiff and defendant in the original action are continued in the notices of bail and exception, the rule for better bail, and the rule to certify, until the transcript of the record is carried over and filed in the King's Bench, or Exchequer Chamber; and then the names of the parties are reversed, and they are called "*C. D. against A. B. in Error.*"⁹

When the transcript of the record is returned and filed, but not before,¹⁰ the plaintiff in error may move to *amend* the writ of error, or the defendant in error to *quash* it; or it may *abate*, or be *discontinued*. Of these things therefore I shall treat in their [*1218] order; and afterwards, of the mode of compelling the plaintiff in error to proceed, and assign errors.

Great certainty was formerly required, in making the writ of error

¹ L. P. E. 35.

² 2 Bac. Abr. 203.

³ Cro. Eliz. 84.

⁴ Append. Chap. XLIV. § 97, &c.

⁵ 2 Durnf. & East, 17. L. P. E. 31. 7 East, 111.

⁶ 1 Maule & Sel. 104. 2 Maule & Sel. 210.

⁷ R. T. & M. 28 Car. II, C. P.

⁸ Barnes, 499.

⁹ Append. Chap. XLIV. § 21. n.

¹⁰ 1 Ld. Raym. 529. 2 Smith R. 259.

agree with the record: for as the writ was the sole authority by which the judges were empowered to act, they could proceed only on that record which the writ or commission authorized them to examine; nor could any defects therein be amended, before the 5 Geo. I. c. 13. because, by the former statutes of amendment, the judges were only enabled to amend in *affirmance* of the judgment.^f But now, by the above statute, "all writs of error, wherein there shall be any variance from the original record, or other defect, may and shall be amended, and made agreeable to such record, by the respective courts where such writs of error shall be made returnable, &c." Upon this statute, it has become the practice to amend the writ of error, as a matter of course, without costs;^g and it has been amended, by striking out the name of one of the plaintiffs in error.^h But if a writ of error be brought by a *feme covert*, without joining her husband, the court will not allow an amendment of the writ, unless it appear by affidavit, that the husband concurs.ⁱ And where it is amended, by striking out the name of one of the plaintiffs in error, the recognizance of bail in error must also be amended.^k In suing out the writ of error, a mistake had been made in the name of the defendant in error, who thereupon issued execution, and the court of King's Bench granted a rule to show cause, why the sheriff should not pay the money levied on the execution into court, and enlarged that rule, in order to allow the plaintiff in error to amend his writ.^l And where a writ of error was sued out on a judgment of the Common Pleas, in an action of *covenant*, describing it as a plea of *trespass on the case*, the court of King's Bench, in which it was returnable, upon application made to them, permitted the writ of error to be amended, by substituting the words "in a plea of covenant broken," instead of the words, "in a plea of trespass on the case," without imposing any terms whatever.^m But this statute does not extend to any appeal of felony or murder; nor to any process upon any indictment, presentment or information, of or for any offence or misdemeanour whatsoever.ⁿ And where a writ of error was [*1219] returnable *before the giving of the judgment on which it was brought, the court on consideration held this to be such a fault as was not amendable by the statute.^o

The general ground of *quashing* a writ of error^p is some fault or defect therein, that is not amendable by the above statute: and the application to quash it ought to be made, either to the court of Chancery, from whence it issues, or to the court wherein it is returnable.^q When there are several parties, who are aggrieved by a

^f 2 Bac. Abr. 200. Carth. 368.

^g 2 Str. 863. 902. 2 Ld. Raym. 1587. S. C.

^h 1 Str. 683. 2 Str. 892. Fitzgib. 201.

ⁱ 1 Barnard. K. B. 405. 421. S. C. Cowp.

^k 425. 2 Blac. Rep. 1067.

^l 1 Chit. Rep. 369.

^m 2 Blac. Rep. 1067.

ⁿ 2 Smith R. 259.

^o 5 Taunt. 86.

^p See the statute, § 2. But see 1 Kenyon, 470. where a writ of error was amended, on an information in nature of *quo warranto*.

^q 2 Str. 807. 2 Ld. Raym. 1531. S. C. 2 Str. 891. S. P.

^r Append. Chap. XLIV. § 33.

^s Doug. 350.

judgment, and the writ of error is brought by some or one of them only, the courts will quash it.¹ But when one of several parties to a judgment, who is not aggrieved thereby, joins in bringing a writ of error, we have just seen, it may be amended, by striking out his name, and stand good for the other parties: And it may be quashed as to one judgment, upon which it does not lie, and stand good for another, upon which it is properly brought.² Costs are payable in all cases, on quashing a writ of error, even though none were recoverable in the original action;³ it being declared by statute,⁴ that "upon the quashing any writ of error, for variance from the original record, or other defect, the defendant in error shall recover against the plaintiff his costs, as he should have had if the judgment had been affirmed, and to be recovered in the same manner:" which costs include those of quashing the writ of error.⁵ But when the defendant in error enters continuances on the original judgment, to defeat the writ of error, the plaintiff is not liable to costs on quashing it.⁶

A writ of error may *abate* by the act of God, the act of law, or the act of the party. If the *plaintiff* in error die, before errors assigned, the writ abates; and the defendant in error may thereupon sue out a *scire facias quare executionem non*, to revive the judgment against the executors or administrators of the plaintiff in error.⁷ But if the plaintiff in error die, after errors assigned, it does not abate the writ:⁸ In such case the defendant, having joined in error, may proceed to get the judgment affirmed, if not erroneous; but must then revive it, against the executors or administrators of the plaintiff in error.⁹ And a writ of error does in no case abate by the death of the *defendant* in error, whether it happen before or after errors assigned: If it happen before, and the plaintiff will [*1220] not assign errors, the executors or administrators of the defendant in error may have a *scire facias quare executionem non*, in order to compel him;¹⁰ or if it happen after, they must proceed as if the defendant in error were living, till judgment be affirmed, and then revive by *scire facias*, but cannot take out execution pending the writ of error:¹¹ And in order to compel the executors or administrators to join in error, the plaintiff may sue out a *scire facias ad audiendum errores*,¹² either generally or naming them.¹³ Before the statute 8 & 9 W. III c. 11. § 7. if there had been several *plaintiffs* in error, the death of one of them, before errors assigned,

¹ *Ante*, 1189, 90.

² 1 *Ld. Raym.* 328. 1 *Salk.* 89. 404. 7 *Mod.* 3. 5 *Mod.* 397. *Carth.* 447. *Lil. Ent.* 225. 290. 8 *C.*

³ 1 *Str.* 262. 8 *Durnf. & East.* 302.

⁴ 4 *Ann.* c. 16. § 25. and see 2 *Str.* 834. *Cas. temp. Hardw.* 137.

⁵ 2 *Ld. Raym.* 1403. 1 *Str.* 606. 8 *Mod.* 316. 8 *C.*

⁶ 1 *Str.* 139. 2 *Str.* 834. *Barnes*, 250.

⁷ 2 *Crompt.* 401, 2. and see *Barnes*, 206.

⁸ *East*, 296.

⁹ *Yelv.* 112, 13. 1 *Vent.* 34. 1 *Salk.* 264. *Barnes*, 432. *L. P. E.* 114.

¹⁰ *L. P. E.* 114.

¹¹ *Yelv.* 112, 13. 1 *Sid.* 419. 2 *Vent.* 34. 1 *Salk.* 264. 1 *Ld. Raym.* 439. 8 *C.* *Id.*

¹² 1 *Ld. Raym.* 1295. 8 *P.*

¹³ 2 *Bulst.* 230, 31.

† *Vide ante*, p. 1188. n. (†).

would it seems have abated the writ;^a but now, by the above statute, which has been holden to apply to writs of error, the writ does not abate by the death of one of several *plaintiffs* in error, if the cause of action survive;^b and therefore, in such case, the defendant in error should enter a suggestion of the death on the roll, and give a rule for the surviving plaintiff to assign errors.^c So, if there be several *defendants* in error, and one of them die, it is no abatement; for they are not named in the writ.^d In the latter case, the death being suggested on the roll,^e the writ of error proceeds against the survivors. By the *death* of the chief-justice, before he has made or signed his return, the writ of error becomes ineffectual;^f and the defendant in error, by leave of the court, may take out execution;^g but if the return be signed in his life-time, it may be made afterwards;^h and though it be neither made nor signed, yet if the defendant in error take out execution without leave of the court, it is irregular.ⁱ

It was formerly holden, that a writ of error, in the House of Lords, abated by the *dissolution* of parliament,^j or even by the *prorogation* of it;^k but afterwards the Lords declared, that a writ of error should not determine by the prorogation of parliament;^l and at length it was ordered, that upon a dissolution, all appeals and [1221] writs of error should "continue, and be proceeded on *in statu quo*, as they stood at the dissolution of the last parliament." If a writ of error be brought in the Exchequer chamber, and that being discontinued, another be brought in parliament, the second writ is a *supersedeas* of execution: but if a writ of error be brought in parliament and abate, and the plaintiff bring a second, this is no *supersedeas*, because it is in the same court.^m

Bankruptcy is no abatement of a writ of error: Therefore, where the defendant in error becomes bankrupt, his assignees cannot sue out a *scire facias* in their own names, to compel an assignment of errors; but should proceed in the bankrupt's name till judgment.ⁿ But the writ of error abates by the marriage of a *feme plaintiff* in error.^o And where, to a *scire facias quare executionem non*, the plaintiff in error pleaded in abatement, that the *defendant* in error was married since the judgment, and before the issuing of the *scire facias*, the defendant moved to quash her own writ, which was granted without costs.^p

If the writ of error be not quashed or abated, the plaintiff in error may, after the record is certified, forthwith proceed to assign his

^a Yelv. 208, 9. 1 Salk. 261. Carth. 236.
S. C. 1 Ld. Raym. 244. 1 Salk. 319. S. C.

^b 1 Barn. & Ald. 586. and see Man. Ex. Pr. 488. (a.)

^c 1 Barn. & Ald. 587.

^d Godb. 66. 68. 1 Ld. Raym. 439. 1 Salk. 264. S. C.

^e Lil. Ent. 217.

^f 1 Keb. 658. 686.

^g Barnes, 201. Prac. Reg. C. P. 195. S. C.

^h 1 Sid. 268.

ⁱ Barnes, 201. Prac. Reg. C. P. 195.

S. C.

^j Cro. Jac. 342. 2 Bulst. 163. S. C. T. Raym. 5.

^k 1 Vent. 31. 1 Sid. 413. S. C. 1 Vent. 266.

^l 1 Lev. 165. 2 Lev. 93. 1 Mod. 106. S. C. 1 Vent. 266. S. P.

^m T. Raym. 383. Com. Dig. tit. *Parliament*, P. 2. but see 1 Vent. 266. 2 Cramp. 391.

ⁿ 1 Vent. 100. 1 Mod. 285.

^o 1 Durnf. & East, 463.

^p 2 Str. 880. 1015. 1 Str. 638.

errors. And it was formerly holden, that after the record was certified, the plaintiff in error must have assigned his errors, and sued out a *scire facias ad audiendum errores* to bring in the defendant in error, the same term, or the term next after the record was certified; otherwise the whole matter was *discontinued*.⁷ But it has been since determined, that if the plaintiff in error lie still, after a writ of error brought, and do not assign errors, this is no discontinuance of the writ of error;⁸ though it is otherwise, if he makes default after joinder in error.

If the plaintiff in error will not proceed after the record is certified, the defendant, in order to compel him, should sue out a writ of *scire facias quare executionem non*, in the court wherein the writ of error was returnable, except on a writ of error *coram nobis*, or *vobis*, or by the plaintiff to reverse his own judgment, or in *quare impedit*, where the judgment for the defendant is, that the plaintiff take nothing by his writ, but be in mercy for his false claim, and in all cases of the same nature, where there is no adjudication to the defendant of damages or costs; and, in the Exchequer chamber, he should give a rule *for the plaintiff to allege *diminution*, [*1222] or that the record is not duly certified or transcribed.

In the King's Bench we may remember,^a as the parties have no day in court given to either of them, on the removal of the record by writ of error, the defendant in error hath no other way of compelling the plaintiff to assign his errors, than by suing out a writ of *scire facias quare executionem non*,^b &c.; and if, upon such writ, the plaintiff in error do not assign errors, but suffer judgment to pass by default upon *scire feci*, or two *nihils*, no errors afterwards assigned shall prevent execution.^c

The *scire facias quare executionem non* is a judicial writ issuing out of the court of King's Bench, where the record is supposed to be; and the intent of it is to bring in the plaintiff in error to assign his errors: Therefore, where a *scire facias* was prayed by one of several defendants in error, the fault was holden to be cured by the plaintiff's coming in upon it, and assigning his errors.^d This writ may be sued out after the expiration of the rule to certify or transcribe the record, though before the transcript is actually brought into court and filed;^e and it may issue immediately after the record is certified, though before the rule for certifying it is expired;^f and should be directed to the sheriff of the county in which the action was laid. In point of form, it pursues the judgment of the Common Pleas; the record and proceedings whereof are stated to have been brought, for certain causes of error, into the King's Bench:^g This writ may be *tested* before the return of the writ of error;^h and it should be made returnable on a general return day or day certain, according to the nature of the proceedings; if by *original* writ, on

⁷ F. N. B. 20.

⁸ 3 Salk. 145.

^a *Ante*, 1158.

^b Godb. 68. 2 Leon. 107.

^c Carth. 40, 41.

^d 3 Bur. 1791, 2.

^e 15 East, 646.

^f 2 Durnf. & East, 17.

^g Append. Chap. XLIII. § 75, 6.

^h 2 Chit. Rep. 193.

a general return day, *ubicunque*,¹ &c. but if by *bill*, or attachment of privilege, on a day certain at *Westminster*.² If the transcript be brought in by the *esso* day of the term, the *scire facias* may bear teste on the last day of the preceding term; or if brought in within the term, on the first day of that term.¹ And if there be only one writ, there should be *fifteen* days between the teste and return, by *original*;³ or, if there be two writs, between the teste of the first and return of the second.² The *alias* in such case cannot issue before [*1223] the return of the former writ; and ought to be tested, by *original*, on the *quarto die post* of the return of that writ, or by *bill*, on the very return day.⁴ A *scire facias* in error need not lie *four* days in the office, as a *scire facias* against bail must.⁵

On the return day of the *scire facias*, if *scire feci* be returned, or of the *alias* writ, if there be two *nihils*, by *bill*, or on the *quarto die post* of the return by *original*,⁶ the defendant in error must give a *rule to appear*,⁷ with the clerk of the rules, which expires in *four* days exclusive:⁸ and *Sunday* is not one of the *four* days in this rule, although it be not the last.⁹ Within that time, the plaintiff in error might formerly have appeared, and pleaded to the *scire facias*, in this as in other cases;¹⁰ and there was an old rule, that if the party pleaded to the *scire facias*, and it went against him, execution might be sued out, but that the writ of error should go on notwithstanding.¹¹ Afterwards the court, in consideration of the delay arising from this practice, established it as a standing rule for the future, that "if upon the return of the *scire facias*, the plaintiff assigned his errors, then all further proceedings should be stayed upon it; but where he chose to stand out upon pleadings to the *scire facias*, execution should go, if it were adjudged against him."¹² From this time, the court appear to have discountenanced pleadings upon the *scire facias*; and in some instances to have set them aside.¹³ At present, the *scire facias* is considered merely as a means of compelling an assignment of errors;¹⁴ and it seems to be the practice now, to admit of no plea thereto, by the plaintiff in error.¹⁵ If errors are assigned, before the expiration of the rule to appear to the *scire facias*, all further proceedings upon it are stayed of course; but if the plaintiff do not assign his errors, and give a copy of them to the defendant's attorney in error, before the time allowed by the rule on the *scire facias* is expired, the attorney for the defendant in error may enter judgment on the *scire facias*, and take out execution thereon: and this he may do, though he has previously given a rule to assign errors, which has not expired.¹⁶ But the writ of error still remains in force; and

¹ 2 Leon. 107. and see 6 Mod. 86. 3 Salk. 320.

² 1 Str. 694. 2 Ld. Raym. 1417. S. C.

³ 2 Crompt. 345. 6 Imp. K. B. 795. L. P. E. 38.

⁴ 1 Kenyon, 373.

⁵ 2 Crompt. 346. Imp. K. B. 793. and see 13 East, 391.

⁶ 2 Salk. 699. Imp. K. B. 795.

⁷ 3 Bur. 1723. 4 Bur. 2439.

⁸ 13 East, 391.

⁹ Append. Chap. XLIV. § 34.

¹⁰ 2 Crompt. 347.

¹¹ 2 Chit. Rep. 192. and see 11 East, 271. 1 Barn. & Ald. 528.

¹² 1 Yelv. 6, 7. Carth. 40, 41. 3 Salk. 145.

¹³ 1 Str. 638.

¹⁴ 1 Str. 391.

¹⁵ *Id.* 679. 2 Ld. Raym. 1414. S. C. and see 3 Bur. 3792. 1 Durnf. & East, 463.

¹⁶ *Ante*, 1222.

¹⁷ 2 Crompt. 348.

¹⁸ 15 East, 204.

the defendant in error can have no costs, unless he give a rule for the plaintiff to assign errors.*

**Diminution* is either of the body of the record, or of its [*1224] out-branches, as of the original writ, warrant of attorney, &c. If the judges of the Common Pleas, or other judges, upon a writ of error, do not certify all the record, the party that sues the writ of error may allege diminution of the record, and pray a writ to the justices who certified the record before, to certify the whole of it.^d But it is a rule, that a man cannot allege diminution, contrary to the record which is certified; as if, on a writ of error, it be certified that the judgment was that the defendant should be *in misericordia*, the defendant in error cannot allege for diminution, that the record is *quod capiatur*, because this is contrary to the record certified.^e And, except in *Wales* and the counties palatine,^f diminution cannot be alleged, upon a writ of error brought on a judgment in any inferior court.^g

The *rule to allege diminution* is an *eight day rule*, given by the clerk of the errors in the Exchequer chamber;^h and if the writ of error be returnable the first day of term, the plaintiff in error is to transcribe the same term, allege diminution the term following, assign errors the next term, and argue them the fourth term; but if the defendant in error, instead of serving the rule to transcribe at the return of the writ, neglect it for a term or two, the plaintiff must transcribe in that term in which the rule is served, allege diminution the same term, assign errors the term following, and argue them the third term.ⁱ A copy of the rule to allege diminution being made, and served on the attorney for the plaintiff in error, it is incumbent on him to allege diminution within the *eight days* allowed by the rule; and if he neglect to do so, the clerk of the errors, on being applied to, with an affidavit of the service of a copy of the rule, will sign a *nonpros*,^k and tax the defendant in error his costs; but unless an affidavit be made, he usually sends to the attorney for the plaintiff in error, and if diminution be not alleged by the next morning, he will then sign the *nonpros* of course, and tax the costs.^l

*When the plaintiff in error has alleged diminution, the [*1225] next step to be taken by the defendant in error, is to give a *rule* for the plaintiff to assign errors; which is the *first* proceeding on a writ of error *coram nobis* or *vobis*, and may be given immediately after the allowance and notice of the writ of error:^m It is also the first

* 2 Bac. Abr. 216. and see 2 Crompt. 347.

^d 2 Bac. Abr. 204. F. N. B. 25. a. and see Cro. Eliz. 155. 281. 1 Nels. Abr. 658.

^e 1 Rol. Abr. 764. Godb. 267. 2 Ld. Raym. 1122. 1 Salk. 269. S. C. And in a modern case, where a writ of error was brought in parliament, on a judgment of the court of Exchequer in *Ireland*, affirmed in the Exchequer chamber there, the House of Lords held, that diminution could not be alleged in the body of the record, contrary to the *transcript*; and refused to issue a *certiorari* for verifying it.

Rowe v. Power, ex dim. Boyse & another, in Error, Dom. Proc. die Mart. 8 Mar. 1803. but see 1 Bulst. 181. 2 Lil. Abr. 422. 1 Salk. 49. Lil. Ent. 226. 245. 556. 559. 565.

^f 1 Sid. 147. 364. 1 Salk. 266. *in marg.* *Id.* 270. Lil. Ent. 226. 245.

^g 1 Sid. 40. 1 Salk. 266.

^h Append. Chap. XLIV. § 35.

ⁱ L. P. E. 92.

^k Append. Chap. XLIV. § 97, &c.

^l Imp. K. B. 784, 5.

^m 2 Crompt. 394. Imp. K. B. 815. L. P. E. 78.

proceeding, after the transcript is brought in, on a writ of error by the plaintiff to reverse his own judgment;^a or when there is no adjudication to the defendant of damages or costs.^o In the King's Bench, this is a *four* day rule, given by the master,^p on the expiration of the rule to appear to the *scire facias*;^q and after being entered with the clerk of the rules, a copy of it should be made, and served on the attorney for the plaintiff in error.

In the Exchequer chamber, if the plaintiff in error allege diminution, the rule to assign errors is given the next term, with the clerk of the errors, in like manner as the rule to allege diminution, and expires in *eight* days after service.^r And in that court, a plaintiff in error is not confined to taking out one rule in each term, but may proceed as quickly as he pleases.^s On a writ of error returnable in parliament, when the transcript is brought in, a peer moves the house, without any previous proceeding, for a day to be given the plaintiff in error to assign his errors, which is ordered accordingly;^t and ought to be done within *eight* days after the bringing in of the writ of error, with the record.^u Within the time limited by the rule or order to assign errors, if they are not assigned, the defendant in error may sign a *nonpros*,^x and is entitled to costs.^y

An *assignment* of errors is in nature of a *declaration*;^z and is either of errors in *fact*, or errors in *law*. The former consist of matters of fact, not appearing on the face of the record, which, if true, prove the judgment to have been erroneous; as that the defendant [*1226] in the *original action, being under age, appeared by attorney;^a that a *feme* plaintiff or defendant was under coverture, at the time of commencing the action;^b or that a sole plaintiff or defendant died before verdict, or interlocutory judgment.^c But where judgment of nonsuit has been given in an action brought against an *infant*, it is no ground of error, that he appeared by attorney.^d And the defendant in *ejectment* is not allowed to assign for error, the death of the nominal plaintiff.^e An assignment of errors in fact should conclude with a verification;^f and in assigning the death of the defendant in error, the assignment ought not to

^a 3 Bur. 1772.

^o *Ante*, 1221, 2.

^p Append. Chap. XLIV. § 36.

^q 6 Durnf. & East, 367. and see 2 Str. 917. In the case of *Sumbidge v. Housley*, in Error, 2 Durnf. & East, 17. it was holden, that the rule to assign errors might be given at the same time as the rule to appear to the *scire facias*; but, according to this determination, the rule to assign errors, which expires in four days *inclusive*, would have expired before the rule to appear to the *scire facias*, which, we have seen, does not expire till four days *exclusive*; *ante*, 1223. and therefore the practice was altered as above.

^r Append. Chap. XLIV. § 37.

^s 1 Brod. & Bing. 514.

^t For the form of the order, see Append. Chap. XLIV. § 38.

^u *Ordo Dom. Proc. die Ven.* 13 Dec. 1661.

^x *Id.* Append. Chap. XLIV. § 97, &c.

^y L. P. E. 31. 7 East, 111.

^z 2 Bac. Abr. 216.

^a Append. Chap. XLIV. § 39, 40.

^b *Id.* § 41, 2.

^c *Id.* § 43, &c.

^d 5 Barn. & Ald. 418.

^e 2 Str. 899. but see 1 Sid. 93. T. Raym. 59. S. C. where it was assigned for error.

^f 1 Bur. 410. Carth. 367. but see Yelv. 58. *contra*.

conclude in the common way, but by praying a *scire facias ad audiendum errores*, against the executor or administrator of the defendant in error; and if the sheriff return that he is alive, then he may come in and plead *in nullo est erratum*; or his attorney may appear for him, and say that he is alive;¹ but if the sheriff return that he has warned the executor or administrator, that will be a sufficient ground for the court to proceed and examine the errors.²

Errors in *law* are common or special. The *common* errors are, that the declaration is insufficient in law to maintain the action; and that the judgment was given for the plaintiff instead of the defendant,³ or *vice versa*: *Special* errors are the want of an original writ,⁴ bill, or warrant of attorney;⁵ or other matter, appearing on the face of the record, which shows the judgment to have been erroneous. The plaintiff may assign several errors in law, but only one error in fact;⁶ and he cannot assign error in fact and in law together, for these are distinct things, and require different trials.⁷ It is also settled, that nothing can be assigned for error which contradicts the record,⁸ or was for the advantage of the party assigning it;⁹ or that is aided by appearance, or not being taken advantage of in due time.¹⁰ When there are several plaintiffs in error, they must join in assigning errors,¹¹ unless some of them have been summoned and severed. And where the assignment has been merely calculated for delay, the courts have in some instances set it aside.¹² The assign- [*1227] ment of errors is engrossed on four-penny stamped paper; and need not be assigned by counsel: In the King's Bench, it is *delivered* to the defendant's attorney; in the Exchequer chamber, and House of Lords, it is *filed* with the clerk of the errors, or clerk in parliament.

If the plaintiff assign for error the want of an original writ, bill, or warrant of attorney, &c. or that it is bad in point of law, he should regularly take out a *certiorari*, to verify his errors: for it is a rule, that judgment cannot be reversed, for want of an original writ, bill, or warrant of attorney, nor for any supposed error or defect therein, without a *certiorari*.¹³ The error in such case, unless confessed, is not considered to be completely assigned, until it appear, by the return to the *certiorari*, that it is well founded.¹⁴ And it is said, that the plaintiff in error cannot till then bring in the defendant, to plead to the errors.¹⁵ Also, by the course of the King's Bench, if diminution be alleged, errors cannot be entered, till the *certiorari* be returned, and the rules to plead are expired.¹⁶

A *certiorari* is a judicial writ,¹⁷ issuing out of the court where the

¹ 1 Sid. 93. T. Raym. 59. S. C.

² Carth. 339.

³ Append. Chap. XLIV. § 50. 7S, 4. 81, 2, 3.

⁴ *Id.* § 51. 62.

⁵ *Id.* § 56. 62. 75.

⁶ F. N. B. 20.

⁷ 2 Bac. Abr. 217. 2 Ld. Raym. 883. 1 Str. 439. *Davie v. Franklin*, H. 26 Geo. III. K. B.

⁸ 2 Bac. Abr. 218. 1 Str. 684. 2 Ld. Raym. 1414. S. C. 1 Wils. 85. S. P.

⁹ 2 Bac. Abr. 220. 1 Str. 382. but see 2 Saund. 47. (8.)

¹⁰ 2 Bac. Abr. 221. 2 H. Blac. 267. 299.

¹¹ 2 Bac. Abr. 217. Imp. K. B. 785, 6.

¹² 1 Str. 141. 545. 2 Str. 899. Lil. Ent.

¹³ 228. *in marg.*

¹⁴ 9 Edw. IV. 34. b. 1 Rol. Abr. 764. 2

Ld. Raym. 1398. 1441. *Cas. temp. Hardw.* 118, 19.

¹⁵ Com. Rep. 115.

¹⁶ 2 Ld. Raym. 1047.

¹⁷ 1 Keb. 211.

¹⁸ Barnes, 12.

writ of error is depending, on a proper *præcipe*,^a and directed to the judge or officer who has the custody of the writ, or other matter to be certified; as, to the *custos brevium*, for certifying an original writ,^b or to the chief-justice in the King's Bench, for certifying a bill,^c or warrant of attorney,^d &c. This writ, which is required to be on a *twenty shilling stamp*,^e is *tested* in the name of the chief-justice of the King's Bench, when it issues out of that court; or when it issues out of the Exchequer chamber, in the name of the chief-justice of the court of Common Pleas;^f and ought not to bear teste before the assignment of errors.^g The writ of *certiorari* being signed and sealed, should be delivered to the judge or officer to whom it is directed; and is made returnable *immediatè*, or without delay.^h It [*1228] has been doubted, whether the court have power to *amend* this writ.ⁱ

When a *certiorari* is prayed, the defendant in error may come in *gratis*, and confess the want of an original, &c. by pleading *in nullo est erratum*,^k or a release,^l which renders it unnecessary for the plaintiff in error to sue out a *certiorari*; or, if there be an original, &c. he may go to the master of the office, in the King's Bench, and get a rule for the plaintiff in error to return his *certiorari*.^m This is a *four day rule*, given by the master, on the back of the draft of the *scire facias quare executionem non*; and after being entered with the clerk of the rules, a copy of it is served on the plaintiff's attorney. In the House of Lords, it is a rule, that "if the plaintiff in error allege diminution, and pray a *certiorari*, the clerk shall enter an award thereof accordingly;ⁿ of which he is required to give a certificate, upon request:^o and the plaintiff may, before *in nullo est erratum* pleaded, sue forth the writ of *certiorari* in ordinary course, without special petition, or motion to the House, for the same; and if he do not prosecute such writ, and procure it to be returned, within *ten days* next after his plea of diminution put in, then, unless he shall show good cause to the House, for enlarging the time for the return of such writ, he shall lose the benefit of the same, and the defendant in error may proceed, as if no such writ of *certiorari* were awarded."ⁿ This is the common course of proceeding: but if the House be soon about to rise, they will, upon petition, of which there must be *two days'* previous notice, order the plaintiff in error to return the writ of *certiorari* by a short day.

^a Append. Chap. XLIV. § 52. 57.

^b *Id.* § 53. ^c *Id.* § 76. 78.

^d *Id.* § 58. 78. For certifying bail in the original action, the admission of an infant to sue by *prochein ami*, an imparlance or other continuance, or a writ of inquiry, the *certiorari* is directed to the chief-justice of K. B.; but for certifying warrants of attorney, or a writ of inquiry, in C. P. it is directed to the *custos brevium*. Lil. Ent. 555, &c. 2 Ld. Raym. 1476. 1 Wils. 85.

^e Stat. 48 Geo. III. c. 149. *Sched.* Part II. § III. 55 Geo. III. c. 184. *Sched.* Part II. § III.

^f 2 Str. 819. 2 Ld. Raym. 1554. 8: C.

^g *Id.* *ibid.* but see 1 Str. 440.

^h Lil. Ent. 555, &c.

ⁱ Barnes, 12.

^k 1 Salk. 267. 2 Ld. Raym. 1156. S. C. 2 Str. 907. S. P.

^l 1 Salk. 268. 3 Salk. 399. 2 Ld. Raym. 1005. 6 Mod. 113. 206. S. C. 2 Ld. Raym. 1047. 3 Salk. 214. 6 Mod. 235. Holt, 563. S. C.

^m Com. Rep. 115. 1 Salk. 267. 2 Ld. Raym. 1156. S. C. Append. Chap. XLIV. § 54.

ⁿ *Ordo Dom. Proc. die Ven.* 13 Dec. 1661.

^o *Id.* *die Ven.* 21 Feb. 1717.

Within the time allowed to the plaintiff in error, for the return of the *certiorari*, he either gets it returned, or not: If it be not returned, the assignment of the want of an original, &c. is of no effect; and the defendant in error, having entered on record a *non misit breve*,^p may, notwithstanding such assignment, plead *in nullo est erratum*, and proceed to affirm the judgment.^q If a return be made to the writ of *certiorari*, it is either that there is, or is not an original writ, bill, or warrant of attorney,^r &c.: And as diminution cannot be alleged, so it is a rule, that matter cannot be returned to the *certiorari*, contrary to the record.^s The return being made, is filed in [*1229] the treasury of the court, where the defendant's attorney should search for it.

We have already seen,^t that the want of an original writ or bill is aided after verdict, by the statute 18 *Eliz. c. 14.*; but not after judgment by default or confession, or upon demurrer, or *nul tiel record*. Therefore, if the want of an original after verdict be assigned for error, the defendant in error may confess it, by pleading *in nullo est erratum*. But if a writ of error be brought after a judgment by default, &c. it is usual for the defendant in error, if there be no original already sued out, to present a *petition*^u to the Master of the Rolls, praying that the cursitor of the county where the venue is laid, may be directed to issue an original, with a proper return.^x This petition must be presented, before the defendant in error takes out a rule for the plaintiff to return the *certiorari*: And an order,^y being obtained thereon, a copy of the petition and order should be forthwith served on the adverse attorney; and if he do not in two or three days make his election, either to accept the costs in error, or prosecute his writ, the costs in error must be tendered him; and if he accept thereof, the defendant in error may immediately sign a *nonpros*, and, after entering a *remittitur*, take out execution on the judgment;^z but if he refuse to accept the costs, choosing rather to prosecute his writ of error, the petition and order should be delivered to the cursitor, who will make out the original writ, which must be returned by the sheriff, and then filed with the *custos brevium*.^a The same course is observed after an *amendment* of the proceedings in the original action, pending a writ of error; upon which the plaintiff in error may make his election, either to accept the costs, or prosecute his writ.^b And a bill may be filed to warrant a judgment, after the want of it has been assigned for error.^c

The plaintiff in error can have but one writ of *certiorari*.^d Therefore, where he took out a *certiorari* of a wrong term, which did not verify his error, and afterwards moved for a second *certiorari*, it was denied him: the court saying, it may be granted to affirm, but

^p Append. Chap. XLIV. § 69.

^q 1 Balk. 267. 2 Ld. Raym. 1156. S. C. 544.

² Crompt. 374.

^r Append. Chap. XLIV. § 55. 59. 77. 79.

^s 2 Ld. Raym. 1123, 4.

^t *Ante*, 123. 954.

^u Append. Chap. V. § 27.

^x *Ante*, *124. and see 6 Durnf. & East,

^y Append. Chap. V. § 29.

^z L. P. E. 30.

^a *Id.* 31, 2.

^b *Ante*, 771, 2.

^c 1 Taunt. 126.

^d Cro. Jac. 597.

not to reverse a judgment.^c But if it be certified on the plaintiff's writ, that there is no original,^f or warrant of attorney,^g or one that [*1230] is bad, *or warrants not the declaration,^h the defendant in error may, at any time before *in nullo est erratum* pleaded, make a suggestion that there is an original or warrant of attorney, or a good one of a different term, or even of the same term with the *placita*,ⁱ and pray a *certiorari* for certifying it; and if a good original be returned, the court will not inquire when it was filed; or if a bad original was before certified, they will disregard it, and apply the record to that which is good, and will support the judgment. But it is a rule,^k that "no *certiorari* upon a writ of error, shall be sued out or made by any attorney, after a *certiorari* in the same cause hath been already sued out and returned, without motion in court by counsel."

In the King's Bench, as the parties have no day in court after the record is removed, the plaintiff in error may, after he has assigned his errors, have a *scire facias ad audiendum errores*^l against the defendant, who thereupon may appear and plead *in nullo est erratum*, or a release,^m &c. But in practice it is usual for the defendant in error, by consent, to take notice voluntarily of the assignment of errors; which consent is testified by his pleading *in nullo est erratum*, and then there is no occasion for a *scire facias ad audiendum errores*.ⁿ When a *scire facias* is sued out, and the defendant does not appear and join in error, the plaintiff may move to reverse the judgment, upon producing the record of the *scire facias*, with the sheriff's return of *scire feci*, and an entry of the defendant's default, without taking out a rule to join in error,^o and even without moving for a *concilium*, or putting the cause in the paper.^p

The Exchequer chamber not having the record before them, but only a transcript, do not award a *scire facias ad audiendum errores*; but notice is given to the parties concerned.^q And, in the House of Lords, the plaintiff must get a peer to move the House, that on assigning errors, the defendant may appear and make his defence. In error to reverse a common recovery, there ought to be a *scire facias* against the tertendants, *ad audiendum processum et recordum*:^r but to this they can only plead a release of errors.^s

To an assignment of errors, the defendant may plead or demur. Pleas in error are common or special: The common plea, or *joinder*, [*1231] as it is more frequently called, is *in nullo est erratum*,^t or that there is no error in the record or proceedings; which is in the nature of a demurrer, and at once refers the matter of law arising thereon, to the judgment of the court.

^c 2 Str. 765. and see *id.* 819. S. P.

^f Cro. Car. 91.

^g Cro. Jac. 277. 1 Salk. 266. 6 Mod. 174. S. C.

^h 1 Rol. Abr. 765. Cro. Jac. 130. 597.

ⁱ Cro. Car. 410.

^j Com. Rep. 118. 1 Salk. 267. 2 Ld. Raym. 1476.

^k R. E. 11 Car. I. K. R.

^l Append. Chap. XLIV. § 63, &c.

^m 2 Bac. Abr. 207. F. N. B. 44.

ⁿ Carth. 41.

^o 1 Str. 144.

^p 2 Str. 1210.

^q 1 Vent. 34.

^r 1 Leon. 290. 1 Lev. 72. Carth. 111.

^s Append. Chap. XLIV. § 67.

^t 1 Bur. 260. *Ante*, 1174.

^u Append. Chap. XLIV. § 68, 9. 80. 84.

If the plaintiff in error, assign an error in fact, and the defendant in error would put in issue the truth of it, he ought to traverse or deny the fact, and so join issue thereupon, and not say *in nullo est erratum*; for by so doing, he would acknowledge the fact alleged to be true.^a But when an error in fact is assigned, if the defendant would acknowledge the fact to be as alleged, and yet insist that by law it is not error, he ought to rejoin *in nullo est erratum*. Hence it appears, that if an error in fact be well assigned, *in nullo est erratum* is a confession of it; for the defendant ought to have joined issue thereon, so as to have it tried by the country: But if an error in fact be assigned that is not assignable, or be ill assigned, *in nullo est erratum* is no confession of it, but shall be taken only for a demurrer.^a

If error be alleged in the body of the record, *in nullo est erratum* is a good rejoinder; for this shall put the matter in the judgment of the court, the record being agreed to be as stated.^c So, if error be alleged in a matter of record, which is not of the body of the record, but in a collateral thing, as that there is no record of resummons, *in nullo est erratum* is a good rejoinder; for if the plaintiff in error do not allege diminution, and thereupon procure a certificate from the inferior court, that there is not any re-summons, before the rejoinder entered, the assignment is of no effect, but void, inasmuch as this is to be tried by the record itself, and no diminution can be alleged after rejoinder entered: and though the defendant confess the error, yet the court ought not to reverse the judgment, till they are satisfied it is erroneous by the record itself.^a If the plaintiff in error assign error in fact and error in law, which we have seen cannot be assigned together, and the defendant in error plead *in nullo est erratum*, this is a confession of the error in fact, and the judgment must be reversed;^a for he should have demurred for the duplicity, upon which the judgment would have been affirmed.^b

By pleading *in nullo est erratum*, the defendant in error admits the record to be perfect; the effect of his plea being that the record in "its present state is without error:" and therefore, after [*1232] *in nullo est erratum* pleaded, neither party can allege diminution, or pray a *certiorari*.^d But though the parties are bound by their own admission, and that equally so as to every part of the record, yet no admission of the parties can or ought to restrain the courts from looking into the record before them.^e Hence it is a general rule, that at any time pending a writ of error, whether before,^f or after errors assigned, or even after *in nullo est erratum* pleaded,^g the courts *ex officio* may award a *certiorari*; and they may do this

^a 1 Rol. Abr. 763. 1 Kenyon, 350.

^a 2 Bac. Abr. 218. but see Carth. 338.

Davie v. Franklin, H. 26 Geo. III. K. B.

^c 1 Rol. Abr. 763.

^d *Id.* 764. 9 Edw. VI. 32. b.

^e 2 Bac. Abr. 218. Carth. 338, 9. Comb. 320. S. C.

^b 2 Ld. Raym. 883. 1 Str. 439.

^c 1 Salk. 270.

^d *Id.* 269. 2 Cromp. 378.

^e 1 Salk. 270. 1 Str. 440.

^f 1 Rol. Abr. 764, 5. 1 Salk. 269. 2 Ld. Raym. 1005. S. C. Cas. temp. Hardw. 118, 19.

to supply a defect in the body of the record,^b as well as in its out-branches.

When the plaintiff assigns for error the want of an original or warrant of attorney, and the defendant comes in *gratis*, and confesses the matter assigned for error, by pleading *in nullo est erratum*,ⁱ or a release,^k without putting the plaintiff to the necessity of suing out a *certiorari* to verify his errors, the court, for their own information, may award this writ, in order if possible to support the judgment. And so, if error be assigned in the original writ, and upon a *certiorari* granted, an erroneous original be returned, upon which *in nullo est erratum* is pleaded, and after the court grant a second *certiorari* for another original, and upon this a good original is certified, the court will intend this to be the original on which the judgment was given, in favour of judgments, which ought to be intended good, till the contrary is manifest.^l But though the court *ex officio* will award a *certiorari* to affirm a judgment, yet they will never award one to reverse it, or make error.^m

Special pleas to an assignment of errors contain matters in confession and avoidance, as a release of errors,ⁿ or the statute of limitations,^o &c. to which the plaintiff in error may reply or demur, and proceed to trial or argument. A release of errors contained in a warrant of attorney to confess a judgment is good, though given before judgment, provided it be dated in the term of which the judgment is entered up.^p But where there are several plaintiffs in [*1233] error, the *release of one of them shall not bar the others.^q In pleading a release, the defendant must lay a venue; but though it be ill pleaded, yet if there are no errors, the court will affirm the judgment.^r When error is brought on a judgment that the *parol* shall demur, the nonage cannot be pleaded again, for that would be *exceptio ejusdem rei, cujus petitur dissolutio*.^s

The plea or joinder in error, &c. is engrossed on four-penny stamped paper;^t and, if common, need not be signed by counsel. In the King's Bench, it is *delivered* to the plaintiff's attorney.^u In the Exchequer chamber, or House of Lords, it is *filed* with the clerk of the errors, or clerk in parliament.

Issue being joined in error, the proceedings are *entered* of record: And on a writ of error *coram nobis*, they must be entered on the *same* roll as the original judgment, or former writ of error.^x On a

^a 1 Salk. 270.

^b 2 Str. 907.

^c 1 Salk. 268. 2 Ld. Raym. 1005. S. C.

^d 1 Rol. Abr. 765. *Ante*, 104.

^e 1 Salk. 269. 2 Str. 765. 819. 907. *Cas. temp. Hardw.* 118, 19. but see 2 Bac. Abr. 205. and the cases there cited; by which it appears, that formerly the court would have granted a *certiorari* to reverse the judgment, as well as to affirm it.

^f 2 Bac. Abr. 225. *Append. Chap. XLIV.* § 71, 2.

^g Stat. 10 & 11 W. III. c. 41.

^h 2 Str. 1215. and see 8 Taunt. 434.

ⁱ Cro. Eliz. 648, 9. Cro. Jac. 116, 17. 3 Mod. 135.

^j 1 Salk. 268. 3 Salk. 399. 2 Ld. Raym. 1005. 6 Mod. 113. 206.

^k 2 Str. 861. 2 Ld. Raym. 1433. S. C.

^l 55 Geo. III. c. 184. *Sched. Part. II.* § III.

^m *Ante*, 724.

ⁿ Cro. Eliz. 755. 284. 1 Ld. Raym. 151. *Carth.* 369. S. C.

writ of error from an inferior court, or from the Common Pleas to the King's Bench, the entries are made by the attorney for the defendant in error,¹ on *different* rolls, entitled of the term the writ of error is returnable; and begin with the writ of error and return, after which the proceedings in the inferior court or Common Pleas are entered, to the end of the final judgment: then follows the judgment of *nonpros* for not assigning errors, or, if they are assigned, the assignment of them; and if it be of errors in *fact*, the plea and replication, &c. are next entered, with an award of the *venire facias*,² or if it be of errors in *law*, there is an entry of the joinder, with a continuance by *curia advisari vult*,³ after which the roll proceeds with the finding of the jury, or determination of the court, and judgment of affirmance or reversal. And a mistake of the clerk, in entering the assignment of errors and joinder of a wrong term may be amended.⁴

On an issue in *fact*, a record of *nisi prius*⁵ is made up, and the parties proceed to trial, as in common cases; and, after verdict, the party for whom it is found must move to put the cause in the paper for argument;⁶ and then, on producing the *postea*, the court will give judgment according to the finding: In this case the [*1234] defendant as well as the plaintiff, may carry down the cause to trial, without a rule for trying it by *proviso*.

On an issue in *law* in the King's Bench, either party may move for a *concilium*,⁷ draw up and serve the rule, enter the cause with the clerk of the papers, and proceed to argument, as on demurrer.⁸ Previous to the day of argument, copies of the books, or proceedings in error should be delivered (as on demurrer,) by the plaintiff or his attorney, on unstamped paper, to the chief-justice and *senior* judge, and by the defendant or his attorney, to the two other judges;⁹ in which should be inserted the names of the counsel who signed the pleadings;¹⁰ and the exceptions intended to be insisted upon in argument, should be marked in the margin.¹¹ If either party neglect to deliver the books, they ought to be delivered by the other;¹² and in that case, the party neglecting cannot be heard, but judgment will of course be given against him.¹³

In the Exchequer chamber, there are no more than *two* return days in every term; one is called the general *affirmance day*, being appointed by the judges of the Common Pleas and barons of the Exchequer, to be held a few days after the beginning of every term, for the general affirmance or reversal of judgments; the other is called the *adjournment* day, which is usually held a day or two before the end of every term. On the first of these days, judgments

¹ *Ante*, 774.

² Append. Chap. XLIV. § 85.

³ *Id.* § 86, &c.

⁴ 3 Maule & Sel. 591.

⁵ Append. Chap. XLIV. § 96.

⁶ 1 Str. 127.

⁷ Append. Chap. XLIV. § 94.

⁸ *Ante*, 796, &c.

⁹ R. M. 17 Car. I. K. B. and see R. E. 2 Jac. II. (a.) R. T. 40 Geo. III. K. B. 1

East, 131. *Ante*, 796.

¹⁰ R. E. 18 Car. II. K. B. *Ante*, 796.

¹¹ R. E. 2 Jac. II. revived by R. H. 38 Geo. III. K. B. and see R. H. 48 Geo. III. C. P. 1 Taunt. 203. *Ante*, 511. 796, 7.

¹² 4 Taunt. 147.

¹³ R. M. 17 Car. I. K. B. Imp. K. B. 799.

R. E. 27 Car. II. K. M. 6 Geo. II. reg. 3. C. P. *Sed quare*; and see 6 Durnf. & East, 477. 1 Boa. & Pul. 292. *Ante*, 798.

are affirmed or reversed, or writs of error *nonprossed*; the intent of the latter is to finish such matters as were left undone at the former: on which last-mentioned day also, as well as on the first, judgments may be affirmed or reversed, or writs of error nonprossed, on paying an additional fee to the clerk of the errors, and setting down the cause *two* days before the adjournment day.^m

The proceedings in this court are entered by the clerk of the errors, who sets down the cause, at the instance of either party, without a motion for a *concilium*: In making the entry, after setting forth the writ of error and return, and the proceedings in the court of King's Bench, a day is given to the plaintiff to assign errors; after which the assignment of errors, and other subsequent proceedings, are [*1235] entered on the return days they are put in, with a separate *placita* for each day.ⁿ It is a rule in the Exchequer chamber, that "no copy of error and record thereupon be delivered to the justices or barons, before the attorney for the plaintiff in error shall have given *ten* days notice to the clerk of the errors in the Exchequer chamber, that the error assigned in the record is to be argued before the said justices and barons, for both parties; and that the attorney for the plaintiff shall deliver *four* copies to the justices of the Common Pleas, and the attorney for the defendant shall deliver *four* other copies to the barons of the Exchequer, *four* days before the hearing of the cause:"^o To enable the parties to deliver these copies, a transcript of the proceedings is made for them, by the clerk of the errors.

In the House of Lords, when the defendant hath joined in error, the cause is set down, on the motion of a peer, to be heard in turn; after which, if the house is likely to be soon up, either party may on petition,^p of which *two* days previous notice should be given to the other, have the cause appointed for a short day: And when a day is appointed for hearing the cause, the same cannot be altered but upon petition; and no petition can in such case be received, unless *two* days' notice thereof be given to the adverse party, of which notice oath is to be made at the bar of the house.^q Previous to the argument, the *cases* for both parties must be drawn up, and signed by counsel;^r and it is usual for each party to deliver two hundred and fifty printed copies of them at the Parliament office, *four* days at least before the hearing,^s some of which are given to the lords, and others to the judges.

On the day appointed for argument, the counsel for the parties are heard, being previously instructed, and furnished with copies of the paper books, or printed cases; and if there be no argument, one of them moves for judgment of affirmance or reversal. If the errors be argued, one counsel only is heard on each side, in the King's Bench; the counsel for the plaintiff in error begins, the counsel for

^m L. P. E. 181, 2.

ⁿ L. P. E. 173, &c. Append. Chap. XLIV. § 95.

^o R. E. 33 Car. II. Imp. K. B. 788. 9.

^p Append. Chap. XLIV. § 115.

^q *Ordo Dom. Proc. die Merc.* 22 Dec. 1703.

^r *Id. die Mart.* 19 Apr. 1698. and see *id. die Merc.* 24 Feb. 1813.

^s *Id. die Mart.* 12 Jan. 1724.

the defendant is then heard, and the plaintiff's counsel replies:^c In the House of Lords, no more than two counsel can be heard on each side;^d and one counsel only to reply.^e

*The judgment in error, unless the court are equally [*1236] divided in opinion, is to *affirm*, or to *recall* or *reverse* the former judgment; that the plaintiff be *barred* of his writ of error; or that there be a *venire facias de novo*. The common judgment for the defendant in error, whether the errors assigned be in fact or in law, is that the former judgment be *affirmed*.^f So, on a demurrer to an assignment of errors, in fact and in law, for duplicity, the judgment is *quod affirmetur*.^g For error in *fact*, the judgment is *recalled*, *revocatur*,^h and for error in *law*, it is *reversed*.^b On a plea of release of errors,^c or the statute of limitations,^d found for the defendant, the judgment is, that the plaintiff be *barred* of his writ of error. It has already been shown, in what cases a *venire facias* is grantable *de novo*.^e

When the court of King's Bench are equally divided in opinion upon a writ of error, it seems there can be no rule for affirming or reversing the judgment, without consent; and therefore, in the case of *Thornby v. Fleetwood*,^f the court being divided in opinion, a rule was made, with the assent and at the instance of the lessor of the plaintiff, to expedite the determination of the cause in the House of Lords; whereby it was ordered, that the judgment should be affirmed.^g But in the Exchequer chamber, it is the practice, upon a division, to affirm the judgment, as was done in the case of *Deighton v. Greenville*.^h And so is the practice in the House of Lords; which depends on their mode of putting the question to reverse the judgment, a majority being required to reverse it.ⁱ

A judgment, when entire, cannot, it is said, regularly be reversed in part, and affirmed for the residue.^k Therefore, where A. brought "an action on the case for damages against B. for words [*1237]

^c *Ante*, 513.

^d 2 *Crompt.* 329.

^e *Ordo Dom. Proc. die Sab. 2 Mar. 1727.*

^f *Append. Chap. XLIV. § 103. 107.* 114. 116.

^g *Yelv.* 58. 2 *Ld. Raym.* 883. 1 *Str.* 439.

^h 2 *Bac. Abr.* 230.

ⁱ *Append. Chap. XLIV. § 104, 5, 6.* 108.

^j 1 *Show.* 50. 1 *Str.* 127. 683. but see *Ast. Ent.* 339. 1 *Str.* 382. *semb. contra.*

^k 2 *Str.* 1055. *Cas. temp. Hardw.* 345. B. C.

^l *Ante*, 953, 4.

^m 1 *Str.* 379. and see 1 *Salk.* 17.

ⁿ *Lil. Ent.* 524. By the statute 14 *Edw. III. stat. 1. c. 5.* it is provided, "that whereas causes have been delayed for difficulty and division in opinions; therefore, to remedy the delays occasioned thereby, there shall in every parliament

be chosen a prelate, two earls, and two barons, who by good advice of others, are to give judgment; or if they cannot determine it, that then the record shall be brought into parliament, who shall make a final accord: and the judges before whom the cause is depending shall proceed to give judgment, pursuant to their directions." But there appear to be no footsteps for centuries, of any such appointment of a prelate, two earls, and two barons; and the court of King's Bench, in the above case, thought it would be improper, on a writ of error from the Common Pleas, to adjourn the cause for difficulty into the Exchequer chamber, or House of Lords. 1 *Str.* 383.

^o 1 *Show.* 36. *Cruise, on Fines*, 222.

^p 1 *Str.* 383.

^q 2 *Bac. Abr.* 227. 1 *Ld. Raym.* 255, 6. 2 *Ld. Raym.* 825.

spoken of him, and for causing him to be indicted, &c. and the jury found a verdict for the plaintiff as to both, with *entire* damages, yet it being afterwards holden that the words were not actionable, the judgment was reversed *in toto*.¹ But if part of the words laid be not actionable, and *several* damages are given, it seems that judgment shall be reversed in part only.² And where judgment is given for the plaintiff in *debt* on two counts, one of which is bad, the court may reverse it as to that count, and also as to the damages and costs, which, being given generally, apply to the whole declaration, and cannot be separated, and affirm it as the other count.³

When there are several dependent judgments, and the principal one is reversed, the other cannot be supported: As if a man recover in *debt* upon a judgment, if the first judgment be reversed, the second falls to the ground.⁴ But the reversal of the last judgment will not affect the first: As if a judgment be given against *executors* in an action of *debt*, and after a *scire facias*, judgment is given against them, to have execution of their proper goods, and a writ of error is brought upon both judgments; in this case, if the first judgment be good, and the last erroneous, the last judgment only shall be reversed, and the first shall stand.⁵

So, if there be several distinct and independent judgments, the reversal of the one shall not affect the other: As in an action of *account*, if judgment be given *quod computet*, and after auditors are assigned, and upon the account judgment is given against the defendant also, with damages and costs, and after a writ of error is brought upon both judgments, and thereupon the last judgment only is found to be erroneous; in this case, the last judgment only shall be reversed, and not the first judgment, but that shall stand in force; for these are two distinct and perfect judgments, the first judgment being *ideo consideratum est quod computet, et defendens in misericordia*.⁶ So, if the judgment consist of several distinct and independent parts, it may be reversed as to one part only; as for costs alone,⁷ or damages in *scire facias*,⁸ or for damages and costs in a *qui tam* action.⁹

If judgment be given against the defendant, and he bring a writ of error, upon which the judgment is reversed, the judgment, it is [*1238] said, shall only be *quod iudicium revesetur*; for the writ of error is brought only to be eased and discharged from that judgment. But if judgment be given against the plaintiff, and he bring a writ of error, the judgment shall not only be reversed, if erroneous, but the court shall also give such judgment, as the court below should have given; for the writ of error is to revive the first cause of action, and to recover what he ought to have recovered by the first suit, wherein an erroneous judgment was given.¹⁰ The former part of

¹ 2 Bac. Abr. 228.

² 1 Str. 188.

³ 6 Taunt. 645. 2 Marsh. 304. 308, 9. S. C. and see 2 Chit. Rep. 30. (a.)

⁴ 2 Bac. Abr. 229.

⁵ *Id. ibid.* and see 2 Str. 1055. Cas. temp. Hardw. 345. S. C.

⁶ 2 Bac. Abr. 228, 9.

⁷ Lil. Ent. 233. 1 Str. 188.

⁸ 2 Str. 808. 2 Ld. Raym. 1532. S. C.

⁹ 4 Bur. 2018.

¹⁰ 2 Bac. Abr. tit. *Error*, M. 2. 1 Salk.

262. 401. 4 Mod. 76. S. C. 4 Bur. 2156. 12 East, 669.

this distinction, however, does not appear to be well founded: for in a late case,^{*} where judgment had been given in the Common Pleas for the plaintiffs, upon a special verdict in *assumpsit*, which was reversed upon a writ of error in the King's Bench, the defendant was holden to be entitled, in the latter court, not only to judgment of acquittal, but also for the costs of his defence in the Common Pleas, being the same judgment which the court below ought to have given; the defendant in such case being entitled to his costs, by the statute 23 Hen. VIII. c. 15. But there must be a rule *nisi*, for reversing a judgment given for the plaintiff in an inferior court, and that it be referred to the master to tax the plaintiff in error his costs, where the defendant has not joined in error.[†] If judgment be given for the plaintiff on one count in a declaration, and a distinct judgment for the defendant on another, and the defendant bring a writ of error to reverse the judgment on the first count, the court of error cannot examine the legality of the judgment on the second count, no error being assigned on that part of the record.[‡]

When a judgment against the plaintiff is reversed, on a writ of error brought in the King's Bench, that court, having the record before them, may in all cases give such judgment as the court below should have given; and if necessary, may award a writ of inquiry to assess the damages. And so, when judgment is given against the plaintiff in the King's Bench, on a *special verdict*, by which the damages are assessed, the Exchequer chamber or House of Lords may, in case of reversal, give a new and complete judgment, for the plaintiff to recover those damages.[§] But when the damages are not assessed, as where judgment is given on *demurrer*, the Exchequer chamber or House of Lords, not having the record before them, but only a transcript, cannot give a new and complete judgment, but only an interlocutory judgment *quod recuperet*; and *the transcript being remitted, the court of King's Bench [*1239] will award a writ of inquiry, and give final judgment.^{||}

When the judgment is affirmed, or writ of error nonprossed, the defendant in error is entitled to *costs and damages*, by 3 Hen. VII. c. 10. & 19 Hen. VII. c. 20. By the former of these statutes, reciting that writs of error were often brought for delay, it is enacted, that "if any defendant or tenant, against whom judgment is given, or any other that shall be bound by the said judgment, sue, before execution had,[¶] any writ of error to reverse any such judgment, in delay of execution, that then, if the same judgment be affirmed, or the writ of error be discontinued in default of the party, or the plaintiff in error be nonsuited therein, the person or persons against whom the writ of error is sued, shall recover his costs and damages, for his delay and wrongful vexation in the same, by discretion of the *justice*[‡] before whom the writ of error is

* 12 East, 668.

† 1 Dowl. & Ry. 183.

‡ 6 Durnf. & East, 200.

§ 1 Salk. 403. 1 Ld. Raym. 9, 10. Carth.

|| 319. Skin. 514. S. C. 1 Bos. & Pul. 30.

¶ Cro. Jac. 207. Yelv. 75. S. C.

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§ Cro. Jac. 636. Gilb. C. P. 275.

‡ The word *justice*, in the singular number, is here made use of, instead of the court, there being no court of error consisting of only one judge. Doug. 561. n. 5.

sued." The latter of the above statutes recites the former, and that it had not been put in force, and enacts, that "it shall be thenceforth duly put in execution." Upon these statutes it has been holden, that costs and damages are recoverable in error, for the delay of execution, although none were recoverable in the original action:^c And executors and administrators are liable to costs in error, in cases where they would be liable in the original action.^f But these statutes are confined to judgments recovered by the original plaintiffs below, and affirmed in error, and do not extend to judgments recovered by the defendants below: Therefore, an avowant in *replevin* for rent in arrear, for whom judgment was given below, which was affirmed on a writ of error, is not entitled to be allowed interest on the sum recovered by the judgment.^g

On a writ of error returnable in the King's Bench, that court, on motion, will order the master to compute *interest* on the sum recovered, by way of damages, from the day of signing final judgment below, down to the time of affirmance, and that the same be added to the costs taxed for the plaintiff in the original action.^h In the Exchequer chamber, though the court, it seems, are bound to [*1240] allow *double costs to the defendant in error, on the affirmance of a judgment after verdict in the King's Bench, yet it is entirely a matter in their discretion, whether or not *interest* shall be allowed on such affirmance.ⁱ And the course is said to be, for the officer to settle the costs, unless any particular direction be given by the court; and in taxing them, he allows double the money out of pocket, or thereabouts, but adds no interest as a matter of course.^k Interest, however, has been allowed, in the Exchequer chamber, on the affirmance of a judgment in *assumpsit*, for the balance of a merchant's account, and for interest on that balance.^l So, it has been allowed, on a letter promising payment of an admitted balance, by a bill at two months.^m And though interest is not allowed upon the affirmance of a judgment for money lent merely, yet it is recoverable upon the affirmance of a judgment for the balance of an account for money lent, and for interest upon advances, where the plaintiffs, as bankers, have been in the habit of charging it.ⁿ In such case, however, the affidavit must state, that it was the custom of the bankers to charge interest on their advances, and at what rate.^o So, on a judgment recovered against bankers, for a balance due from them, on account of money deposited in their bank by a customer, the court, on affirmance, ordered interest to be added to the damages, on proof that it was the

^c Dyer, 77. Cro. Eliz. 617. 659. 5 Co. 2 Durnf. & East, 79. 1 Maule & Sel. 171.
^d 101. S. C. Cro. Car. 145. 1 Str. 262. 2 Str. 173.
^e 1084. but see Cro. Car. 425. 1 Lev. 146.
^f 1 Vent. 38. 166. 4 Mod. 245. Carth. 261.
^g S. C. *semb. contra*.
^h 1 H. Blac. 566. and see 2 Str. 977.
ⁱ 10 East, 2.
^j Doug. 752. n. 3. and see 2 Str. 931. 2
Bur. 1096, 7. 1 Blac. Rep. 267, 8. S. C.
^k 2 H. Blac. 284.
^l 2 Bur. 1096. and see 2 H. Blac. 284.
^m 4 Taunt. 298. and see 3 Price, 251. 7
ⁿ Taunt. 245. S. C.
^o 5 Taunt. 758.
^p 4 Taunt. 346.
^q 8 Price, 516.

usage of the bank to allow it.^p And interest has been allowed, in an action for not giving a bill of exchange in payment for goods sold, from the time when the bill, if given, would have become due;^q or for not discounting bills, delivered to the defendant for that purpose, but converting them to his own use.^r So, it has been allowed, in an action on a promise to give a bond or mortgage, which would have carried interest;^s or to make good to the acceptor of a bill, so much money as the dividends of a bankrupt's estate should fall short of the amount of the bill.^t And, in an action of *covenant* for nonpayment of purchase money, interest was allowed on the whole sum recovered, although such money was payable by instalments, and there was an express engagement between the parties, that interest should be payable on the first instalment only.^u

*In *trover* for bills of exchange, the court of Exchequer [*1241] chamber allowed interest from the time of the first judgment, upon all such bills as had been received before the judgment, and upon all such as were received afterwards, from the receipt of them.^v And interest was allowed in one case, on the affirmance in error of a judgment for the proceeds of stock, fraudulently sold out by a person holding a power of attorney to sell;^w and in another, on the affirmance of a judgment, in an action on an attorney's undertaking to pay the debt and taxed costs, on or before a day certain.^x But it seems to be now the practice of the Exchequer chamber, to give interest only in cases where interest was recoverable below;^y unless it be distinctly proved or admitted, that the writ of error was brought for delay:^b and therefore, though they once allowed interest in an action of *tort*,^c and on an attorney's bill,^d yet these decisions were afterwards disapproved of, and interest has been refused in the latter action:^e And it is said to be contrary to the practice of the court, to give interest in an action for mere unliquidated damages.^f So, if judgment be entered generally, upon a declaration in *assumpsit* or *covenant*,^g and some of the counts or breaches are for unliquidated damages, no interest can be allowed on affirmance of the judgment:^h And it is not, it seems, allowed on a count in *assumpsit*, for not accounting for goods delivered to be sold on commission.ⁱ So, interest was refused on the affirmance of a judgment in *Jamaica*, in an action for the price of goods sold and delivered, and interest thereon, and on an account stated, and for interest on the balance; although it was sworn, that the inhabitants of *Jamaica* were always

^p 2 Moore, 206. 8 Taunt. 250. 5 Price, 536. S. C. and see 8 Price, 516, 17. 9 Price, 440, 41.

^q 2 Campb. 428. n. and see *id.* 472. 480. 13 East, 98. 3 Taunt. 157. 4 Taunt. 298.

^r 5 Taunt. 758.

^s 4 Taunt. 876.

^t *Id.* 250.

^u 2 Moore, 195. 8 Taunt. 245. S. C. but see 2 Barn. & Cres. 348.

^v 2 New Rep. C. P. 205. 5 Taunt. 758, 9.

^w 6 Taunt. 117.

^x *Id.* 346.

^y 2 Campb. 428. n. and see *id.* 472. 480. 13 East, 98. 3 Taunt. 157. 4 Taunt. 298.

^b 3 Taunt. 51.

^c 2 H. Blac. 267.

^d *Id.* 284.

^e 2 Bos. & Pul. 319.

^f 2 New Rep. C. P. 360. and see 1 Campb. 518. 2 Campb. 428. n.

^g 6 Taunt. 530. 2 Marsh. 230. S. C.

^h 5 Taunt. 28.

ⁱ *Id. ibid.*

in the habit of charging interest on their balances, and that it was a component part of the sum recovered in the court below:^k And interest is not allowed, on the affirmance of a judgment on a recognizance of bail, in the King's Bench:^l nor in an action on a *replevin* bond;^m nor on an *indemnity* bond, for damages assessed on a suggestion of breaches, under the statute 8 & 9 W. III. c. 11. § 8.ⁿ

[*1242] An affidavit of the cause of action is said to be not absolutely necessary, on moving for interest on the affirmance of a judgment in the Exchequer chamber:^o And the court will not, in the ordinary exercise of its discretion, give interest upon facts stated to them by *affidavit*; because the other party can have no opportunity of contradicting them:^p but where interest is given, the debt must appear, on the face of the record, to be one which carries interest.^q Formerly, the rule to compute interest on the sum recovered by the judgment, was only a rule to show cause, in the King's Bench,^r as well as in the Exchequer chamber:^r But now the rule, in both courts, is absolute in the first instance.^s In the Exchequer chamber, however, it is necessary to give a previous *notice* of motion;^t and on an affidavit of the service of such notice,^u and of the nature of the cause of action, where it does not otherwise appear to the court, they will grant the rule. When interest is allowed, it was formerly calculated at the rate of *four pounds per cent. per annum*:^v but it was afterwards raised to *five pounds per cent.*;^w though, as the value of money has since decreased, the court would now probably allow only *four pounds per cent.* And, in an action against bankers, for money deposited in their bank, an order was made for interest, after the same rate only at which it was the usage of the bank to allow it to their customers.^x In a case which requires it, interest is allowable in the Exchequer chamber, on a judgment of *nonpros*, as well as on a judgment of affirmance:^y And upon a contract to replace stock, and pay dividends in the mean time, *interest* is given, and not further *dividends*, on the affirmance of the judgment.^b But in *debt* on recognizance against bail in error in the Exchequer chamber, the bail are not liable to pay interest between the time of the original judgment and affirmance; though they are liable for interest after affirmance:^c And where the judgment is for principal and interest on a bill of exchange or promissory note, &c. the practice is, for the officer of the court to sever that part of the judgment which was for interest from the principal, by reference to the instrument stated on the record by which it became due, and to compute interest on the principal only.^d

^k 7 Taunt. 244. 3 Price, 250. S. C. and see 1 Stark. N. Pri. 219.

^l 4 Taunt. 722. 6 Price, 338. and see 8 Price, 582.

^m 4 Taunt. 30.

ⁿ 5 Taunt. 656. ^o 2 Price, 7.

^p 7 Taunt. 244. 3 Price, 250. S. C.

^q Doug. 752. n. 3.

^r 2 H. Blac. 284.

^s Append. Chap. XLIV. § 111. but see 1 Dowl. & Ry. 183. *Ante*, 1240.

^t 3 Price, 253. Append. Chap. XLIV. § 109.

^u Append. Chap. XLIV. § 110.

^v 2 H. Blac. 287.

^w 1 Bos. & Pul. 30.

^x 2 Moore, 206. 8 Taunt. 250. 5 Price,

536. S. C. *Ante*, 1240.

^y 1 Bos. & Pul. 29.

^b 7 Taunt. 14.

^c 4 Bur. 2127. 2 Durnf. & East, 58.

^d 5 Taunt. 758.

* In the court holden before the Lord Chancellor, and treasurer and judges, (under the 31 *Edw.* III.) for examining erroneous judgments in the Exchequer, the practice is to give interest, from the day of signing judgment, to the day of affirming it there; computed according to the current, not according to the strictly legal rate of interest.^a In the House of Lords, they give sometimes very large, sometimes very small costs, in their discretion, according to the nature of the case, and the reasonableness or unreasonableness of litigating the judgment of the court below:^f And, in order to mitigate costs, the plaintiff will sometimes withdraw his errors. But the court of King's Bench would not refer it to the master, to tax the plaintiff his costs in error in parliament, on a judgment affirmed on error in the House of Lords without awarding costs, and remitted to the King's Bench, to the end that such proceedings might be had thereon, as if no such writ of error had been brought.^g

By the 13 *Car.* II. stat. 2. c. 2. § 10. "if the judgment be affirmed *after verdict*, the plaintiff shall pay to the defendant in error his *double costs*:" which statute is confined to cases where the judgment so affirmed is for the plaintiff below; and does not apply, where the defendant below obtains judgment upon a special verdict.^h And by the 8 and 9 *W.* III. c. 11. § 2. "if at any time after judgment given for the *defendant*, in any action, plaint or suit, in any court of record, the plaintiff or demandant shall sue any writ or writs of error, to annul the said judgment, and the said judgment shall be afterwards affirmed, the writ of error discontinued, or the plaintiff be nonsuit therein, the defendant in error shall have judgment to recover his costs, against the plaintiff or demandant, and have execution for the same, by *capias ad satisfaciendum, fieri facias, or elegit*."ⁱ This statute, however, only relates to judgments given on *demurrer* for defendants below, to whom remedy was intended to be given for their costs, both below and above, on affirmance of such judgments, which they had not before.^k And none of the before-mentioned statutes give costs in error, upon the *reversal* of a judgment:^l therefore, when a judgment is reversed, each party must pay his own costs: and accordingly, where the plaintiff in *case* recovered a verdict at the trial, and had judgment in the Common Pleas, and upon a bill of exceptions returned into the King's Bench, judgment was reversed, and the plaintiff took nothing by his *writ, it [*1244] was holden that the defendant could not have costs.^m A judgment for the plaintiff was reversed on a writ of error in fact, brought by the defendant; and the court held, that the plaintiff in error was entitled to the costs of the original action, though not to the costs in error.ⁿ

After affirmance, or *nonpros* for not assigning errors, the defendant in error having taxed his costs, which may be done in *four*

^a 2 Bur. 1096. 1 Blac. Rep. 267. S. C. 27. § 3. 2 H. Blac. 287.

^b 2 Bur. 1097. 1 Blac. Rep. 268. S. C. ^k 10 East, 5.

^c 2 Maule & Sel. 349.

^d 5 East, 545.

^e And see the statute 8 & 9 W. III. c.

^l 1 Str. 617. and see 5 East, 49.

^m 5 East, 49.

ⁿ *Per Cur.* H. 40 Geo. III. K. B.

days exclusive after affirmance in the Exchequer chamber,^o may take out *execution* for the sum recovered in the original action, as well as the damages and costs in error, or for these alone, by *feri facias*,^p against the goods and chattels of the plaintiff in error; by *elegit*, against his goods, and a moiety of his lands; or by *capias ad satisfaciendum*,^q against his person.

But when the judgment is affirmed in the Exchequer chamber,^r or house of Lords,^s to which a transcript of the record only is removed by the writ of error, it is necessary that the transcript should be *remitted* to the court of King's Bench, before the execution is issued, or at least before it is returnable.^t And when a writ of error determines in the Exchequer chamber, by abatement or discontinuance, the judgment is not again in the King's Bench, till there be a *remittitur* entered; for without a *remittitur*, it cannot appear to that court, but that the writ of error is still pending in the Exchequer chamber;^u and therefore in such case, it is usual for the party succeeding in the original action to move the court, on an affidavit of the fact, for leave to enter a *remittitur*, and take out execution.^v So, if the plaintiff recover a judgment against two defendants in the King's Bench, and one of them bring a writ of error in the Exchequer chamber, the plaintiff cannot charge the other defendant in execution, till the record be remitted; notwithstanding the writ of error might have been quashed immediately, because not brought by both the defendants. And though a writ of error abate by the death of the plaintiff in error, before it is returned and certified, yet execution cannot afterwards be issued on the judgment, without leave of [*1245] the court: and the court, having set aside the execution on this ground, refused to give the plaintiff in the action leave to issue a *testatum fieri facias*, tested in the preceding term, on the return day of the original *feri facias*, which was after the allowance and service of the writ of error.^y On a writ of error from the King's Bench to the Exchequer chamber, or House of Lords, after the proceedings are remitted into the King's Bench, they are entered at the foot of the original roll in that court; and if a writ of error be first brought in the Exchequer chamber, and afterwards in the House of Lords, the proceedings in both courts are entered, after a *remittitur*, on the same roll.

The writ of execution being founded on the record, must issue out of the court of King's Bench, where the record is;^z and that, as well where the judgment is affirmed on a writ of error *coram nobis*, or from the Common Pleas or an inferior court, returnable in the King's Bench,^a as where it is affirmed in the Exchequer chamber,^b or House of Lords.^c But there was formerly an exception to this

^o Imp. K. B. 833. 2 Sel. Pr. 1 Ed. 520.

^p Append. Chap. XLIV. § 119, &c.

^q *Id.* § 126.

^r Palm. 186, 7.

^s Cowp. 843.

^t Append. Chap. XLIV. § 112, 117, 18.

^u 1 Salk. 261. 319. 1 Ld. Raym. 244.

S. C.

^v 1 Salk. 265. 1 Crompt. 369, 70. And

for the form of a rule for execution, on nonprossing a writ of error, in the Exchequer of Pleas, see Append. Chap. XLIV. § 102.

^y 7 East, 296. *Ante*, 1034.

^z *Ante*, 1032. 1 Ld. Raym. 427. 1 Salk. 321. S. C.

^a Cowp. 843.

^b Palm. 186, 7.

^c Cowp. 843.

rule, when a writ of error lay from the King's Bench in *Ireland* to the King's Bench in *England*; it being holden, that a *capias* did not lie here, for costs given upon affirmance of a judgment in *Ireland*: But the method was, to issue a writ, reciting all the proceedings here, directed to the chief-justice of the King's Bench in *Ireland*, requiring him to issue process of execution; and by this mandatory writ, the cause was restored to that court.^d The writ of execution should be directed to the sheriff of the county where the venue was laid in the original action; and if it issue into another county, should be made a *testatum*: and it must be returnable according to the nature of the former proceedings; if by *bill*, on a day *certain* at *Westminster*, or if by *original*, on a *general* return-day, *ubicunque*, &c.

If judgment be *reversed*, the party shall be restored to all that he has lost by occasion of the judgment;^e and a writ of *restitution* shall be awarded.^f When the plaintiff has execution, and the money is levied and paid, and the judgment is afterwards reversed, there, because it appears on the record that the money is paid, the party, we have seen,^g shall have restitution without a *scire facias*; for there is ^ha certainty of what was lost: otherwise where it was [*1246] levied, but not paid; for there must then be a *scire facias*, suggesting the matter of fact, *viz.* the sum levied,^h &c.

If a man recover damages, and have execution by *feri facias*, and upon the *feri facias* the sheriff sell to a stranger a term for years, and after the judgment is reversed, the party shall be restored only to the money for which the term was sold, and not to the term itself; because the sheriff has sold it by command of the writ of *feri facias*.ⁱ But if a man recover damages in a writ of *covenant* against B. and have an *elegit* of his chattels and a moiety of his lands, and the sheriff upon this writ deliver a lease for years, of the value of 50*l.* to him that recovered, *per rationabile pretium et extentum*, *habendum* as his own term, in full satisfaction of 50*l.* part of the sum recovered, and after B. reverse the judgment, he shall be restored to the same term, and not to the value; for though the sheriff might have sold the term upon this writ, yet here is no sale to a stranger, but a delivery of the term to the party that recovered by way of extent, without any sale, and therefore the owner shall be restored.^k And, for the same reason, if personal goods were delivered to the party, *per rationabile pretium et extentum*, upon the reversal of the judgment, the owner shall be restored to the goods themselves.^l

Before we conclude, it may be proper to say a few words of the writ of *false judgment*, on account of the affinity it bears to a writ of *error*.

^d 1 *Ld. Raym.* 427. 1 *Salk.* 321. *S. C.*
^e *Cro. Jac.* 698.

^f *Append. Chap. XLIV.* § 129, 30. and
see *Append. Chap. XLVI.* § 40.

^g *Ante*, 1072, 3.

^h 2 *Salk.* 588. *Append. Chap. XLIV.*

§ 127, 8. *Lil. Ent.* 641. 650. and see 2
Saund. 101. *y.*

ⁱ 2 *Bac. Abr.* 231.

^k *Id.* 232. *Cro. Jac.* 246. 1 *Maule & Sel.*
425. *Ante*, 1072, 3.

^l 1 *Rol. Abr.* 778. 2 *Bac. Abr.* 232.

The writ of *false judgment* is an *original* writ, issuing out of Chancery; and lies, where an erroneous judgment is given in a court not of record, in which the suitors are judges.^m This writ may be sued by any one against whom judgment is given, his heir, executor or administrator; or by any one who has sustained damage, though the other defendants do not join as they ought to do in error.ⁿ And if the writ be brought upon a judgment in the sheriff's court, it is in nature of a *recordari*;^o or if upon a judgment in another court, not of record, it is in nature of an *accedas ad curiam*.^p If there [*1247] be no *suitors*, by whom the plaint may be certified, there shall not be a writ of false judgment; as in a copyhold court, in which upon an erroneous proceeding, the copyholder must sue to the lord by *petition*.^p

A writ of false judgment is made out by the cursitor; and ought to be served in court; or if the lord refuse to hold his court, a *disstringas tenere curiam* goes against him:^q and it is a *supersedeas* of execution at common law, from the time of service.^r The sheriff is not bound to pay attention to this writ, without being paid for the return of it.^s And, by the statute 33 Geo. III. c. 68. § 3. "no execution shall be stayed upon or by any writ of false judgment, for the reversing of any judgment given in any county court in *Wales*, unless the person or persons who shall prosecute the said writ, be first bound unto the party or parties for whom the said judgment shall have been given, in a recognizance with *two* sufficient sureties, such as the sheriff in the said court shall approve and allow, in the sum of 10*l*. (except where the sum adjudged for costs and damages shall exceed the sum of 10*l*., and in such case in double the sum so adjudged,) to prosecute the said writ with effect, and also to pay and satisfy, if the said judgment be affirmed, or the said writ abated or nonprosessed, all and singular the damages and costs adjudged, and also the costs and damages awarded for the delay of execution." Also, by the statute 34 Geo. III. c. 58. "no execution shall be stayed or delayed, upon or by any writ of false judgment, or *supersedeas* thereon, for the reversing of any judgment in any inferior court, within the county palatine of *Lancaster*, where the debt or damages are under *ten* pounds, unless the person or persons in whose name or names such writ of false judgment shall be brought, with *two* sufficient sureties, such as the court wherein the judgment is given shall allow of, shall first be bound unto the party for whom such judgment is given, by recognizance to be acknowledged in the same court, in double the sum adjudged to be recovered by the former judgment, to prosecute the said writ of false judgment with effect; and also to satisfy and pay (if the said judgment be affirmed, or the writ of false judgment be not proceeded in,) all and singular the debt, damages and costs adjudged, and all costs and damages to be awarded for the delaying of execution."^t

^m F. N. B. 18.

ⁿ Moor, 854.

^o Append. Chap. XLIV. § 131.

^p F. N. B. 18. Co. Lit. 60. a.

^q 6 Hen. VII. 16. a.

^r *Id.* 15. b.

^s Barnes, 199.

^t These provisions seem to have been taken from the statute 19 Geo. III. c. 70. *Ante*, 1204.

Upon the return of the writ,^a when the whole proceedings are certified, and not before, the plaintiff shall assign his errors.^x And if the defendant have day given by the roll, the plaintiff may assign errors,^y without a *scire facias* against him.^z To compel a joinder in error, the plaintiff may have a *scire facias ad audiendum errores*;^a or he may serve a rule, as on a writ of error:^b And, upon two *scire facias's ad audiendum errores* awarded, and *nhils* returned, or *scire feci* and default made, the judgment shall be reversed.^b

When the parties are once in court, the subsequent proceedings in false judgment are the same as in error:^b And if a writ of false judgment abate, or the plaintiff therein be nonsuited, the defendant shall have a *scire facias quare executionem non*.^c On a writ of false judgment, no *costs* are in general recoverable; and it is therefore but seldom advisable to have recourse to this remedy.

^a Append. Chap. XLIV. § 133, 4. 138.

^x For the forms of an assignment of false judgment, and joinder, see Append. Chap. XLIV. § 136, 7. 139.

^y F. N. B. 18.

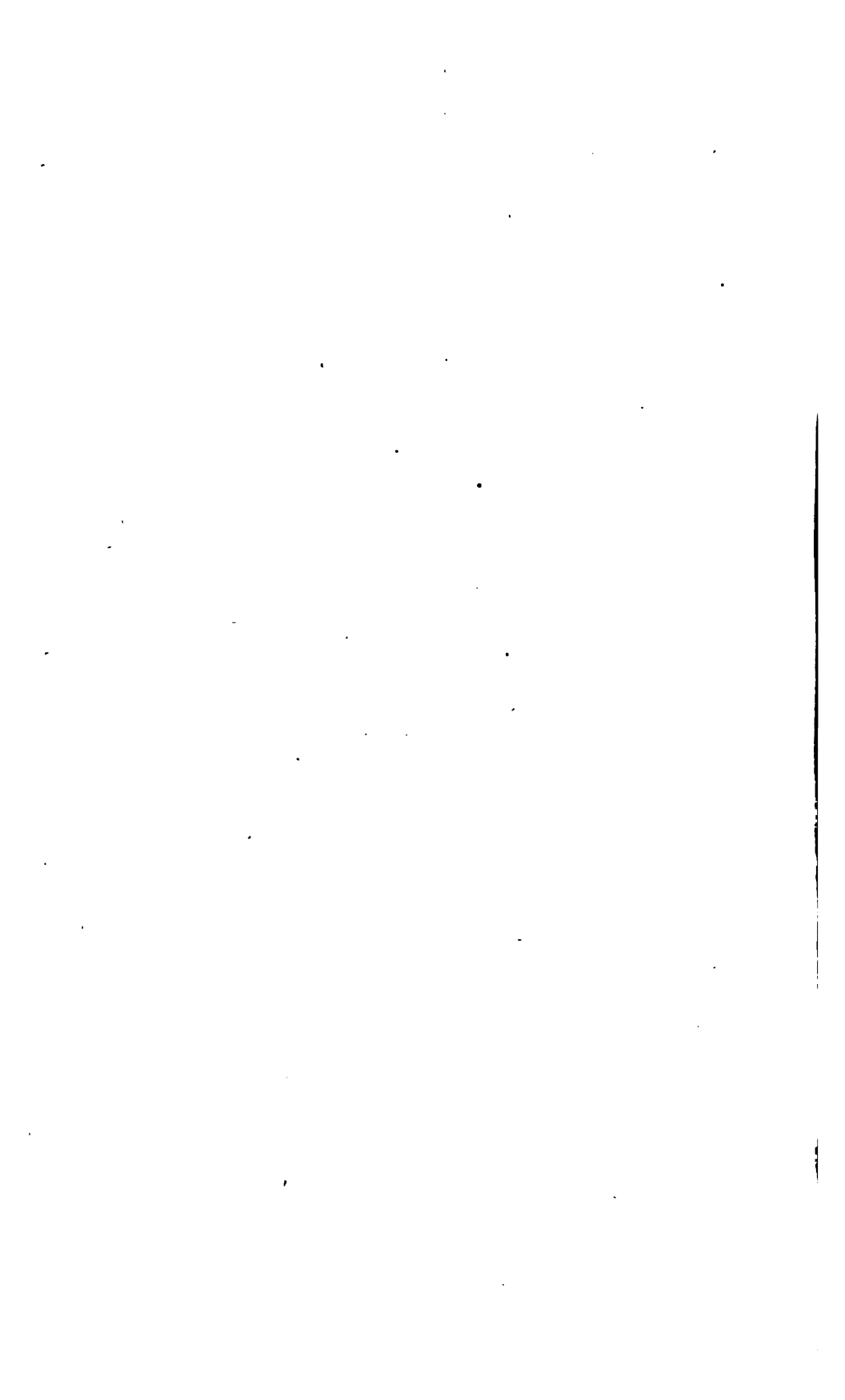
^z 2 Crompt. 406.

^a F. N. B. 18. *Ante*, 1230.

^b 2 Crompt. 406. Append. Chap. XLIV. § 135.

^c F. N. B. 18.

FINIS.



ADDENDA.

Four hundred and eighty-seven pages of this work having been printed before the eighth edition reached the publishers from England, the alterations and additions to those 487 pages as made by Mr. Tidd, together with the English cases published in this country since the year 1824, which relate to the subjects treated in them, and some appropriate American decisions, are here subjoined.

CHAP. I.

Page 1. After the word *equity*, in the last line, instead of the sentence ensuing, the author has substituted the following:—It has been ruled at *Nisi Prius*, that an action of *assumpsit* cannot be maintained on a running account between merchants, or a merchant and his broker; the proper remedy being by action of account: 2 *Campb.* 238. and see *Gilb. Evid.* 192. 2 *Keb.* 781. *Tri. per pais*, 401; but in a subsequent case, it was holden, that whatever doubt might have existed on the subject a century back, the action of *assumpsit*, for the balance due on the result of numerous transactions had been so long maintained, that it was now much too late to make any objection to it; *Arnold v. Webb*, 5 *Taunt.* 432. (a.) and it seems to be now settled, that *assumpsit* will lie for the balance of an account, however voluminous it may be, and that the plaintiff is not obliged to bring an action of account. 5 *Taunt.* 431. 1 *Marsh.* 115. *S. C.* and see 2 *Chit. Rep.* 10, in which two principal officers of the court were appointed *auditors*, on motion, in an action of account.

The following matter is an index of the principal cases and dicta, relating to the action of account render, which are to be met with in the law reports of the courts of the several states of the Union. It may be stated first, in regard to the matter in the text, that in England, to evade the necessity of bringing this form of action, and at the same time to retain the business of accounts in the common law courts, actions on the case for not accounting have been introduced, which have received judicial sanction when founded on the breach of an *express* promise to account. *Carthew*, 89. 1 *Salk.* 9. 1 *Shou.* 71. 2 *Binn.* 330. But it is a question whether the law raises a promise by *implication* to account, where there has been no express promise given by an agent to account. See 2 *Binn.* 325.

PENNSYLVANIA.

Account render is not within the jurisdiction of a justice of the peace. 10 *Serg. & R.* 227.

Account is the only proper remedy at law for one partner against another, where an actual settlement has not been made between them and a balance struck. It is not sufficient that a balance may be deduced from the partnership books to support an action of *assumpsit*. 9 *Serg. & R.* 241. 1 *Binn.* 191.

Joint partners in a mercantile adventure may have account render against each other by the common law: tenants in common by the 27th sect. of the st. 4 Anne, c. 16; which section is in force in Pennsylvania. 3 *Binn.* 317.

To support this action, a contract express or implied must be shown. 3 *Yeates*, 251.

In account between partners, if these facts are proved:—that a partnership existed—that the defendant was the acting partner—and that he received any part of the sum from any of the persons mentioned in the declaration, he will be uniformly obliged to render an account. *Per M'Kean, C. J.* 1 *Dall.* 340.

The distinction between bailiffs and receivers does not apply to the case of partners in trade; for one partner, though charged as a receiver, is entitled to every just allowance against the other. 1 *Dall.* 340.

A reference may be made by consent of the action of account render, under the act of 1705. 3 *Yeates*, 150. And the award may be of a sum of money payable by instalments. 10 *Serg. & R.* 230.

By the act of 30th March, 1821, *Purd. Dig. Ed.* 1824. p. 24. the Compulsory Arbitration Law has been extended to account render. See 4 *Serg. & R.* 76, 77. The award in this action under the act of 1821, must contain an account, shewing the balance resulting in the sum awarded, otherwise it is bad. 10 *Serg. & R.* 227.

In account render between partners, it is sufficient for the plaintiff to charge the defendant generally with the receipt of the money to their joint benefit; and having proved a receipt by the hands of any one of the persons mentioned in the declaration, he is entitled to a general verdict upon the issue of *ne unques receiver*. 1 *Dallas*, 339.

If the declaration in this action, charge the defendant as bailiff of certain goods belonging to the *plaintiff*, to make profit of for the *plaintiff*, and as receiver of certain sums by the hands of A. and B., being the money of the *plaintiff*, and the evidence is of money received from C. and D. on *partnership account*, the plaintiff and defendant being partners, the variance is fatal. 2 *Wash. C. C. Rep.* 482.

Account render by one tenant in common against another under the st. 4 Ann. c. 16. differs from this action at common law; for at the common law, a bailiff is not only answerable for his actual receipts, but for what he might have made out of the land, without his wilful default; but by the statute, a tenant in common, who is sued as bailiff, is answerable only for so much as he has actually received more than his just share. And the auditors at common law could administer an oath only in two particular cases; under the statute, they may examine the parties on oath. The declaration should, therefore, state, that the parties are tenants in common, and that the defendant has received more than his share, in order that the capacity in which the defendant is sued may appear, to enable the auditors to tell how he is to account, and whether they are to examine him on oath. If he is charged as bailiff generally, the plaintiff will be nonsuited, unless he can prove the defendant was actually his bailiff at common law. 10 *Serg. & R.* 221.

In account render, if the matters offered by the defendant in discharge of the plaintiff's demands are disputed by the plaintiff, he may either demur or take issue before the auditors. If there be more points of dispute than one, there may be a demurrer or an issue on each, which are certified by the auditors to the court, and then the matters of law are decided by the court, and the matters of fact by a jury; after which the account is finally settled by the

auditors according to the result of the trials. If either party desire to join issue and the auditors refuse permission, or if the auditors conduct themselves with any manner of impropriety, to the injury of the party, redress is had by application to the court. 5 Binn. 433.

The plaintiff cannot, on the trial of the issues certified by the auditors, give evidence of the receipt of moneys by the defendant, prior to the time laid in the declaration. 14 Serg. & R. 200.

A general verdict for the plaintiff and judgment of *quod computet* do not conclude the defendant as to the dates and sums mentioned in the declaration; but the auditors may make the proper charges and allow the proper credits without regard to the verdict. 2 Serg. & R. 317.

Where the plaintiff lays in his declaration the *value* of the chattels and also damages for not accounting, he obtains judgment for the value and also for damages, distinguishing each, and this, although the value exceed the amount of damages laid. 5 Binn. 568.

If the defendant *resist* the plaintiff's claim by pleading, or where an increase is received by a receiver *ad merchandizandum*, there shall be judgment for damages. *Id. ibid.*

The jury cannot assess damages upon an issue of never bailiff or receiver; the judgment that the defendant account never includes damages. *Id. ibid.*

The report of auditors in account render must state a special account. 4 Yeates, 514.

Quere, whether, if auditors report a balance in favour of the defendant, judgment may be entered for such balance; and whether the defendant may by virtue of the act of assembly sue out a *scire facias* against the plaintiff for such balance? 5 Binn. 433. 3 Serg. & R. 7. But the law is well settled that the defendant may support an action of debt against the plaintiff for the amount of the sum in which he was found in surplusage. 3 Serg. & R. 7.

Exceptions cannot be taken to an account reported by auditors after the same has been returned. 4 Yeates, 358. 3 Binn. 475. 5 Binn. 433. 1 Browne, 262.

A blank in the declaration in account render, for the time during which the defendant acted as bailiff, is cured by an award of arbitrators, if the parties appeared before them, and their proofs and allegations were heard. 10 Serg. & R. 227.

After a judgment *quod computet*, entered by confession, upon a declaration averring that the defendant was the plaintiff's bailiff and receiver during a certain specified period, the plaintiff cannot amend his declaration by laying a different period. 14 Serg. & R. 200.

CONNECTICUT.

The action of account will lie in every case where a person has received money to the use of another; especially if it be received of a third person, to be delivered over, although *assumpsit* may be brought. Kir. Rep. 163.

Where there is a promise to account, the plaintiff has his election to bring *assumpsit* or account. *Id.* 164.

Where personal estate is devised to A. during her widowhood, remainder over, account will lie against A. and her husband to recover the property limited over. 2 Day's Cases, 28.

It is peculiarly the province of auditors to weigh evidence and determine facts, and herein there can be no inquiry after them, nor can their report be set aside for a mistake in point of fact. Kir. Rep. 353. See 3 Day's Cases, 377. as to their power of enquiring into facts.

But the principles of law on which they proceed may be inquired into. 2

Day's Cases, 116. and their report may be set aside for a mistake in point of law. *Kir. Rep.* 358.

The auditors in account may report a balance in favour of the defendant. 2 *Root*, 121.

This action will not lie where the number of partners exceeds *two*, the remedy being in equity. 2 *Conn. Rep.* 425.

MASSACHUSETTS.

An action of account does not lie for one partner against another for a demand originating in mercantile transactions between the firm and another trading company of which the defendant was a partner. *Semb.* 15 *Mass. Rep.* 120.

The action of account is maintainable only against a bailiff, and a bailiff can only be one who is appointed such, or who is made such by the law; which latter instance applies only to a guardian, who is bailiff of his ward, and who is liable, not only for rents and profits actually received, but also for those which he might have received by a proper management of the estate. 12 *Mass. Rep.* 149.

See as to account render between joint tenants, 11 *Mass. Rep.* 325. See as to this action generally, in *Massachusetts*, 1 *Dane's Ab. c.* 8.

NEW JERSEY

In an action of account, auditors take the account and refer objections and issues to the court; and if the party neglect to tender issues in fact or law to them, he cannot afterwards come into court in a summary way and object to the items. 2 *South. Rep.* 791.

Note to the words '*simple contracts*' in line 22, p. 3: In a recent action of debt upon simple contract in the K. B., the plea was *nil debet per legem*, and the defendant prepared to bring eleven compurgators for the purpose of waging his law, the court having refused to say what number would be precisely necessary, but the plaintiff abandoned the action, 2 *Barn. & Cres.* 538. 4 *Dowl. & Ryl.* 3 S. C. The Supreme Court of the United States have decided that wager of law has no existence in the jurisprudence of the Union. 9 *Wheaton*, 642.

In the last edition, after 4 *Maule & Selw.* 113. in n. b. the author adds—And see 3 *Brod. & Bing.* 130. 6 *Moore*, 335. S. C. where the annuity was created by *grant*.

Note to the word '*traversed*' in l. 3 & 4. p. 6: The action of detinue has been frequent in some of the states, particularly in the Southern. The cases are too numerous to be collected into the compass of a note, but may be readily found by reference to that title in the American Digest in 4 vols. and to the Reports published since them.

Page 6. after the word '*asportatis*,' in line 7, the author has added: It seems, that a writ of *replevin* may be properly brought, not merely where there has been a *distress*, as is generally imagined, but in all cases where a person takes goods out of the possession of the party who applies for the writ, upon his giving security, until it shall appear whether the goods are rightfully taken: but if A. be in possession of goods, in which B. claims a property, *replevin* is not the proper writ to try that right. 1 *Scho. & Lef.* 320. 321. n. 327. and see 2 *Stark. Ni. Pri.* 288. where, in an action of *trover*

for books of account, Lord *Ellenborough* intimated, that the bringing an action of *trover* was not the most convenient remedy in a case of this nature; and said, that he had heard Mr. *Wallace* express his surprise, that the remedy by *replevin* was not more frequently resorted to, by means of which the party might obtain possession of the specific chattel of which he had been deprived, instead of an action of *trover*, in which he would recover damages only. [This note is printed in page 7, reference i. of the present edition; with a *quare* at the end of it; but in the eighth edition the author has transferred it as above, and omitted the *quare*.]

In the state of New York, the action of *replevin* is grounded on a *tortious*, or unlawful taking, whether taken under pretence of a distress or not. 10 *Johns. Rep.* 369. 7 *Id.* 140. 17 *Id.* 116. It does not lie, in that state, where the original taking was justifiable. 14 *Id.* 84. 15 *Id.* 401. So in the state of North Carolina. 2 *Taylor*, 98.

In the state of Massachusetts, *replevin* lies for goods wrongfully detained, though the original taking was justifiable, and though the plaintiff never had possession of them, until delivered to him on the service of the writ. 15 *Mass.* 359. 16 *Mass.* 147. 17 *Mass.* 610. So in Pennsylvania, it lies wherever one man claims goods in the possession of another. 1 *Dall.* 157. 6 *Binn.* 3. 3 *Serg. & R.* 562.

So, in the state of Maryland. 1 *Har. & Johns.* 147.

In the state of South Carolina, it appears to be unsettled whether *replevin* will lie in any other case than in a distress for rent. 1 *Rep. Con. Ct.* 401.

Note to the word 'administrators,' in line 15, p. 6.—If an action be brought *expressly* by executors, where several are appointed in the will, they must all join, not excepting an infant executor, because they derive their interest under the will, and the right to sue is equal in all: but where the management is left with (for example) three out of four, and those three enter into a contract, they may sue alone without styling themselves executors. 2 *Bingh.* 177. *C. P.*

To reference c, p. 6, add: And see 4 *Barn. & Ald.* 437. 6 *Moore*, 332.

To reference e, p. 6, prefix: *Golding v. Vaughan*, E. 22 Geo. III. K. B. 2 *Chit. Rep.* 436. S. C.; and at the end of the reference, add: And see 1 *Barn. & Ald.* 29. 3 *Brod. & Bing.* 302.

After the word 'deceased,' in line 23, p. 6, the author in his addenda, directs the following additional matter to be inserted: But in *assumpsit*, by one of two surviving partners, the fact of the plaintiff's being a surviving partner must be stated in the declaration; and therefore, a count for goods sold by the plaintiff to the defendant, is not supported by proof that the goods were sold by the plaintiff and his deceased partner. 4 *Barn. & Ald.* 374. and see 6 *Moore*, 382. but see *id.* 579. It is also a rule, that as a man cannot sue himself, an action cannot be maintained by several plaintiffs, on a joint contract, where one or more of them are liable, with the defendants, to the performance of it. 2 *Bos. & Pul.* 120. 124. (c.) 6 *Taunt.* 597. 2 *Marsh.* 319. S. G. 6 *Moore*, 384.

To the reference p, page 6, the author has added: And see the statute 54 Geo. III. c. 170. § 8. for enabling overseers of the poor to sue on *bastardy* bonds; in the construction of which statute it has been holden, that an action on a *bastardy* bond must be brought in the names of the overseers for the time being, and not of those to whom the bond was given. 3 *Moore*, 21. 8 *Taunt.* 691. S. C. 2 *Chit. Rep.* 322. See also the statute 59 Geo. III. c. 12. § 17. 2 *Dowl. & Ryl.* 708. as to the bringing of actions in the names of *churchwardens* and *overseers*, for or in relation to lands, &c. belonging to the parish, or the rent thereof: And see the statutes 33 Geo. III. c. 54. § 11. and 59 Geo. III. c. 128. § 7. as to bringing or defending actions by or against

the trustees of *friendly societies*. 5 Barn. & Ald. 769. 1 Dowl. & Ryl. 393. S. C.

To reference b, p. 7, the author has added : 4 Moore, 532. 2 Brod. & Bing. 102. S. C.

To reference e, p. 7, after 5 Durnf. & East, 649. the author has inserted : 2 Chit. Rep. 1. and see 6 Moore, 141. 3 Brod. & Bingh. 54. 9 Price, 408. S. C.

After 'abatement,' in l. 12, p. 7, add : Or ground of nonsuit, 3 East, 62. 6 Moore, 141. 3 Brod. & Bing. 54. 9 Price, 408. S. C. but see 12 East 89. 452. 2 Marsh. 485. *semb. contra* ; and see 3 Campb. 29. 1 Bing. 143. where a mistake of the plaintiff's christian name, or omitting the surname of one of the plaintiffs, was holden to be a ground of nonsuit.

After 'contract,' in line 39, p. 9, the author refers to 5 Barn. & Ald. 652. 1 Dowl. & Ryl. 282. S. C.

To reference c, page 11, after 2 Bos. & Pul. 424. add : 5 Barn. & Ald. 652. 2 Chit. Rep. 343. 1 Dowl. & Ryl. 282. S. C. but see 1 New Rep. C. P. 43. 6 East, 333. S. C. in Error.

To reference f, p. 11, add : And see 5 Price, 412. 7 Price, 591. S. C. in Error.

To reference k, p. 11, prefix : 7 Taunt. 580.

To reference l, p. 11, add : 2 Brod. & Bing. 460. 5 Moore, 282. S. C.

After 'individually,' in l. 36, p. 11, add : And a count in *assumpsit* against husband and wife, who was *administratrix* with the will annexed, upon promises by the testator to pay rent, cannot be joined with counts upon promises by the husband and wife, as *administratrix*, for use and occupation by them after the death of the testator. 3 Barn. & Ald. 101. and see 1 Taunt. 212. 2 Chit. Rep. 697.

To the paragraph beginning with 'The assignees,' l. 37, p. 11, prefix : In an action by the *assignees* of a bankrupt, the plaintiffs may join counts for money lent and advanced, and money paid by them, as assignees, with counts for money had and received to their use, and upon an account stated with them, in that character. 5 Maule & Selw. 294. 2 Chit. Rep. 325. S. C. And the assignees under a joint commission against A. and B. may, in an action to recover a debt due to A., describe themselves in the declaration, as assignees of A. alone. 2 Stark. Ni. Pri. 17. and see 8 Taunt. 202. But

To ref. a, p. 13, add : 8 Taunt. 134. S. C.

To ref. b, p. 13, add : 8 Taunt. 200. S. C.

To note c. p. 13, add : 3 Barn. & Ald. 208. 1 Chit. Rep. 619. S. C. and the cases there cited.

To ref. f, p. 13, add : *Speers v. Frederic*, T. 25 Geo. III. K. B.

After 'them,' in l. 4, p. 14, the author had added : The clause of limitation, as to the time within which remedial proceedings against the *hundred* are directed to be commenced, by the 27 Eliz. c. 13. is not adopted by the 1 Geo. I. st. 2. c. 5. nor consequently by any of the subsequent statutes, relating to the demolishing or pulling down of *mills*, &c. ; and there is, therefore, no restriction now in force, as to the time of bringing the action, on parties entitled to the indemnifying provisions of the latter statutes. 1 Price, 343. but see stat. 3 Geo. IV. c. 33. § 15.

Add as a note to '&c.' in l. 5, p. 15 : There is no limitation of time as regards suits in the admiralty for seamen's wages. 2 *Gallison*, 477. The 17th sec. of the statute of Anne, quoted in the text, is not in force in Pennsylvania.

To reference d, p. 16, add : 1 Dowl. & Ryl. 16.

To ref. a, p. 17, add : And see Ballantyne on the statute of limitations, p. 215, &c.

To ref. b, p. 17, add : And see 4 Esp. Rep. 18.

After 'commenced,' l. 15, p. 17, the author adds : But a promissory note,

payable on demand, is payable immediately; and the statute of limitation runs from the date of the note, and not from the time of the demand.* *Christie v. Fonseck*, Sit. Lond. after M. T. 52 Geo. III. C. P. per Mansfield, Ch. J. 1 Selw. Ni. Pri. 4 Ed. pp. 131. 339. 1 Vez. 344. accord. but see Hardr. 36. 1 Mod. 89. 15 Vin. Abr. tit. Limitation, P. 14. And where the breach of a contract is attended with special damage, the statute runs from the time of the breach, which is the gist of the action, and not from the time when it was discovered, 3 Barn. & Ald. 626. and see 4 Moore, 508. 2 Brod. & Bing. 73. S. C. accord. or the damage arose, 3 Barn. & Ald. 288. In an action by an administrator, upon a bill of exchange payable to the intestate, but accepted after his death, it was holden, that the statute of limitations begins to run from the time of granting the letters of administration, and not from the time the bill becomes due; there being no cause of action, until there is a party capable of suing. 5 Barn. & Ald. 204. Note to the last word 'suing:' The statute of limitations is a good plea to an action of *assumpsit* by a surety, who had been bound for and obliged to pay the debt of his principal. The action is not founded on a bond, but on a promise or simple contract, although the executing of the bond as surety, is the consideration of the promise; and the breach of the promise is the not indemnifying the plaintiff against the payment of the bond. Payment by a surety in behalf of his principal, may be a matter in *pais* without suit. 4 Mass. Rep. 182.

After 'judgment,' l. 1, p. 18, add as a note: 14 *Serg. & Rawle*, 15. 2 *Const. Rep.* 5. *Car.* 617. 2 *Rep. Const. Ct. S. Car.* 146. 2 *South. N. J. Rep.* 721. accord. And satisfaction of a judgment after the lapse of twenty years is a presumption of law upon the facts; if there are no facts or circumstances to account for the delay, it is not the duty of the court to submit the question, as an open one, to the jury. 14 *Serg. & R.* 15. If the original judgment were against several defendants, and on a *sci. fa.*, the return as to one, is *nihil habet*, and judgment is entered against him by default; this is not a circumstance to affect the presumption of payment, as an implied confession of judgment. *Id. ibid.*

After 'released,' l. 4, p. 18, the author adds: So, in *assumpsit*, where the statute of limitations is not pleaded or replied, the jury may presume, from length of time and other circumstances, that the debt has been satisfied. 2 *Stark. Ni. Pri.* 497. and see 5 *Esp. Rep.* 52. 1 *Taunt.* 572. but see 1 *Dowl. & Ry.* 16.

To reference m, p. 19, add: And see 2 *Chit. Rep.* 140.

After 'authority,' last line, p. 18, 19, the author adds: So, where a constable, acting under a warrant commanding him to take the goods of A., takes the goods of B. believing them to belong to A., he is entitled to the protection of the statute 24 Geo. II. c. 44. § 8; and an action therefore must be brought against him, within six calendar months. 3 Barn. & Ald. 330. And, in like manner, where constables, under a warrant to search a house for black cloth which had been stolen, finding no black cloth, took cloth of other colours, and carried it before a magistrate, refusing at the same time to tell the owner of the house searched, whether they had any warrant or no; the court of Common Pleas held, that they were within the protection of the statute, and that an action against them ought to have been commenced within six months after the grievance complained of. 2 Brod. & Bing. 619. 5 Moore, 322. S. C. and see 3 Brod. & Bing. 239.

After the word 'afterwards,' l. 31, p. 19, the author has added: To a

* Where a promissory note was made payable "two years after demand:"—Held, that the statute of limitations did not begin to run until the two years after demand had elapsed. 8 *Dowl. & Ry.* 347.

declaration in an action on the case, founded in *tort*, the defendant, in pleading the statute of limitations, should allege that the cause of action did not accrue within *six* years next before the commencement of the suit; a plea of not guilty of the grievances mentioned in the declaration, within *six* years, being bad upon special demurrer. 3 *Barn. & Ald.* 448.

Note to precede the word 'To' in l. 32, p. 19: In all of the actions mentioned in the statute of James, except *assumpsit*, the six years commence from the moment there is a cause of action, and that time cannot be enlarged by any acknowledgement; *Per Best, C. J.* 3 *Bing.* 125. See also 20 *Johns.* 277. *accord.* So the statute is a bar to an action of trover, commenced more than six years after the conversion, although the plaintiff did not know of the conversion until within that period, the defendant not having practised any fraud in order to prevent the plaintiff from obtaining that knowledge at an earlier period. 5 *Barn. & Ald.* 149. 7 *Dowl. & Ryl.* 729. *S. C.*

In an action *on the case* for negligence, where the declaration alleges a breach of duty, and a special consequential damage, the cause of action is the breach of duty and not the consequential damage, and the statute runs from the time when the breach of duty is committed, and not from the time when the consequential damage accrues. 8 *Dowl. & Ryl.* 14.

After 'action,' l. 41, p. 20, add: So, where an action was brought against A. and B. and C. his wife, upon a joint promissory note made by A. and C. before her marriage, and the promise was laid by A. and C. while the latter was sole, and the defendants pleaded the statute of limitations, whereupon issue was joined; the court held, that an acknowledgement of the note by A. within six years, but after the intermarriage of B. and C. was not sufficient to support the issue. 1 *Barn. & Cres.* 248. 2 *Dowl. & Ryl.* 363. *S. C.* And upon a replication, that the defendant did not promise within six years, to a plea of the statute of limitations, fraud in the defendant cannot be set up as an answer to the plea. 2 *Barn. & Cres.* 149. 3 *Dowl. & Ryl.* 332. *S. C.* Mr. Tidd's abstract of the last cited case, which is inserted in the Addenda to his last edition, ends here, but in looking into it I have discovered that each of the judges intimated an opinion that fraud would have been a good answer if it had been specially stated in the replication. See 2 *Barn. & Cres.* 149. particularly what was said by BAYLEY & BEST, Js. See also 5 *Barn. & Cres.* 149. In this country the cases on this question are as follows:

When the statute is pleaded to an action founded on fraud, a replication which avers an ignorance of the fraud until within six years, is sufficient. 1 *Pickering*, 438. 2 *McCord*, 426. *Contra*, 20 *Johns.* 33. And the ignorance so averred is traversable, and may be proved or disproved, like other traversable matters. 1 *Pick. ut supra.*

Such replication is good, though the plaintiff aver generally that he did not discover the fraud until within six years, without stating the time when he discovered it, or any act of the defendant by which the knowledge of it was prevented. *Ibid.*

Note to the word 'statute,' l. 5, p. 21: 'I think, if I were now sitting in the Exchequer Chamber, I should say that an acknowledgement of a debt, however distinct and unqualified, would not take from the party who makes it, the protection of the statute of limitations. But I should not, after the cases that have been decided, be disposed to go so far in this court, without consulting the judges of the other courts.' *Per BEST, C. J.* 3 *Bing.* 330. *C. B.*

After 'statute,' l. 5, p. 21, add: So, in an action brought by an administrator, an agreement for a compromise, executed between the intestate and the defendant, wherein the existence of the debt sued for was admitted, was deemed sufficient to take the case out of the statute. 9 *Price*, 122.

Note to 'him,' l. 27, p. 21 : So an acknowledgement within six years by one of the joint makers of a promissory note will revive the debt against the other, although he has made no acknowledgement, and only signed the note as a surety. 2 *Bing.* 306. *C. P.* in which case, that of *Atkins v. Tredgold*, 2 *Barn. & Cres.* 23. 3 *Dowl. & Ryl.* 200. *S. C.* (in which two of the judges impugned the authority of the cases involving the above points) is commented on and explained by *Best*, *C. J.*

To reference *a*, p. 22, add ; And see 1 *Barn. & Cres.* 248. 2 *Dowl. & Ryl.* 200. *S. C.*

After 'years,' l. 6, p. 22, add : So, where A. and B. made a joint and several promissory note, and A. died, and *ten* years after his death B. paid interest on the note ; it was holden, in an action thereon against the executors of A. that the payment of interest by B. did not take the case out of the statute, so as to make the executors liable. 2 *Barn. & Cres.* 23. 3 *Dowl. & Ryl.* 200. *S. C.*

To ref. *b*, p. 22, add : And see 1 *Bing.* 266.

Note to the word 'statute,' l. 24, p. 22 : A very recent case in the Common Pleas, shows that the judges in England, like those of the United States, are disposed, in spite of the cases collected in the text, to go back to the statute. Thus, where a defendant on being arrested, said, "I know that I owe the money, but the bill I gave is on a three-penny receipt stamp, and I will never pay it," this was held not to be such an acknowledgement as would revive the debt against a plea of the statute. 3 *Bing.* 329. in which case it was said by *Best*, *C. J.* 'there are many cases from which it may be collected, that if there be anything said at the time of the acknowledgement to repel the inference of a promise, the acknowledgement will not take the case out of the statute of limitations.'—Most of the Supreme Judicial courts of the several United States have expounded the statute in accordance with the same doctrine. Thus in New York, 13 *Johns.* 288. 15 *Johns.* 511. 11 *Johns.* 146. In New Hampshire, 2 *N. H. Rep.* 426. In Pennsylvania, 9 *Serg. & R.* 128. 11 *Id.* 10. 12 *Id.* 393. 14 *Id.* 195. In New Jersey, 1 *South.* 153. but see 1 *Coxe*, 159. South Carolina, 2 *Rep. Cons. Ct.* 65. But see 1 *M'Cord*, 320. 2 *Nott & M'C.* 60. In Kentucky, 1 *Bibb*, 443. See also 3 *Bibb*, 269. *Hardin's Rep.* 301. In Massachusetts, 1 *Pick.* 370. See also, 11 *Mass.* 452. 13 *Mass.* 203. In North Carolina, 1 *Hawks*, 304. But see *Cam. Nor.* 93. 1 *Hayw.* 243. 239. 2 *Id.* 6. In the state of Maine, the construction seems different. 1 *Green.* 163.

After 'pay,' l. 6, p. 24, add : So, in *assumpsit* for a seaman's wages, to which the statute of limitations was pleaded, it was proved that the defendant, on being applied to for payment after the lapse of six years, said, "I will see my attorney, and tell him to do what is right," this it seems was not a sufficient acknowledgement to take the case out of the statute. 3 *Dowl. & Ryl.* 267.

To reference *a*, p. 14, add : And see 4 *Esp. Rep.* 184. 5 *Esp. Rep.* 81. 1 *New Rep. C. P.* 20.

To ref. *b*, p. 24, add : 7 *Taunt.* 608. *S. C.*

After 'annuity,' l. 14, p. 24, the author has added in the text : So where, in *assumpsit* on a promissory note, it was proved that on the plaintiff's showing the note to the defendant within six years, the latter said, "you owe me more money ; I have a set-off against it ;" this was holden, by two of the judges, not to be a sufficient acknowledgement within six years, to take the case out of the statute of limitations. 2 *Barn. & Ald.* 759. And where a party, on being asked for the payment of his attorney's bill, admitted that there had been such a bill, but stated that it had been paid to the deceased partner of the attorney, who had retained the amount out of a floating balance in his hands ; it seems that, in order to take the case out

of the statute of limitations, evidence is inadmissible to shew that the bill had never in fact been paid in this manner. 4 Barn. & Ald. 568.

To ref. e, p. 24, 25, add: 2 Chit. Rep. 249. S. C. 3 Barn. & Ald. 626. 5 Moore, 105. 2 Brod. & Bing. 372. S. C.

After 'writ,' l. 32, p. 24, insert: And suing out a *testatum capias ad respondendum* is a good commencement of an action by original. 5 Barn. & Ald. 452. 1 Dowl. & Ryl. 27. S. C.

To ref. m, p. 24, 25, add: But see 3 Brod. & Bing. 212. 6 Moore, 525. S. C. where, in an action in the Common Pleas, the question being, whether a debt would support a commission, or was not barred by the statute of limitations, the creditor proved an action commenced in the King's Bench within six years, and continuances regularly entered, down to the term before the trial; and the court held, that the debt was not barred. And see 1 Bing. 324.

After 'magistrates,' l. 35, p. 26, add: And where a justice of the peace does an act under the colour of his office, though he exceed his jurisdiction, he is entitled to notice, before an action can be brought against him. 1 Barn. & Cres. 12. 2 Dowl. & Ryl. 43. S. C.

To ref. b, p. 26, after K. B. add: 2 Chit. Rep. 459. S. C.

After 'action,' l. 1, p. 28, add: And in stating the cause of action, it is sufficient to inform the defendant substantially of the ground of complaint. 5 Barn. & Ald. 837. 1 Dowl. & Ryl. 497. S. C. but see 2 Chit. Rep. 673.

To. ref. b, p. 28, add: In *Cooke v. Curry*, Durham Sum. Assiz. 1789, Thomson B. held, that the attorney's name and place of abode being in the body, instead of on the back of the notice, was sufficient, on the grounds of the intent of the statute being, that the justice might be able to tender amends to the party or his attorney, and of the case of *Rex v. Bigg*, (8 P. Wms. 419. 1 Str. 18.) in which a writing on the inside of a bank note, was holden to be properly described as an indorsement, even in an indictment for forgery. *Sed quare*: and see 7 Durnf. & East, 634, 5. *Post*, *30.

Add as note to 'length,' l. 5, p. 28: See also 4 Barn. & Cres. 681. where a notice signed by T. & W. A. Williams, whose names were Thomas Adams Williams, and William Adams Williams, was held sufficient.

After '*Birmingham*,' l. 5, p. 28, add: Or "*Bolton en le Moor*:" and refer to *Crooke v. Curry*, Durham Sum. Assiz. 1789. but Thomson B. there said, "*London, Manchester*, or other such large town, generally, would not be sufficient."

To 'months,' l. 4, p. 29, subjoin: 6 Durnf. & East, 224. 1 Bing. 307.

After 'notice,' l. 36, p. *30, add: But a sheriff who levies arrears of taxes, under 48 Geo. III. c. 141. No. V. 2. is not entitled to notice of an action to be brought against him for anything done under the provisions of that act. 1 Bing. 369.

To ref. b. *31, add: And see 5 Price, 168.

After 'insufficient,' l. 21, p. *31, add: And a notice of action, under an act of parliament, against a toll-gate keeper, "for demanding and taking toll, for and in respect of certain matters and things particularly mentioned and exempted from the payment of toll, in and by a certain act of parliament, entitled," &c. is too uncertain, and bad. 2 Chit. Rep. 673.

To ref. f, p. 32, add: And see 2 Bos. & Pul. 158.

After 'poor's rate,' l. 31, p. 32, add: Or a *gaoler*, receiving and detaining a prisoner, 1 Gow, 97.

CHAP. II.

After the paragraph ending with the word 'crown,' p. 34, the author introduces a stat. of 3 Geo. IV. c. 102. directing the meeting of the judges at *Serjeants's Inn Hall* in vacation for the despatch of business and hearing arguments, which it is needless, in this country, to reprint. The author next adds: 'The judges, upon their *circuits*, sit by virtue of five several authorities: 1. the commission of the peace: 2. a commission of *oyer and terminer*: 3. a commission of general *gaol* delivery; 4. a commission of *assize*, directed to the justices and serjeants therein named, to take (together with their associates,) *assizes* in the several counties, that is, to take the verdict of a peculiar species of jury, called an *assize*, and summoned for the trial of *landed* disputes: 5. their authority at *nisi prius* is by the commission of *assize*. 2 *Salk.* 454. being annexed to the office of justices of *assize*, by the st. of Westm. 2. (13 Edw. I.) c. 30. which empowers them to try all questions of fact, issuing out of the courts at *Westminster*; that are then ripe for trial by jury. 3 *Bl. Com.* 59.

After '728,' in note d, p. *45, insert: 2 Chit. Rep. 373. and add at the end: 2 Chit. Rep. 374. 2 Barn. & Cres. 344. And for the *fees* payable by the prisoners therein, see R. Dec. 17, 1730. 4 Geo. II. R. M. 57 Geo. III. R. H. 2 & 3 Geo. IV. K. B. The above rules, subsequent to those of 3 & 4 Geo. II., are to be found in the collection of rules and orders, on the *plea* side of the court of King's Bench, with which Mr. *Short* has obliged the profession.

To n. c, p. *46, add: 1 Bing. 255.

After 'day,' l. 8, p. 50, add: In the Exchequer, the anniversary of the King's *accession* has been holden not to be an holiday. 9 Price, 13. And, on the anniversary of the martyrdom of King *Charles the First*, the *junior* baron of the court sits in the morning, to take motions of course. *Id.* 15.

To c. 21, l. 13, p. 50, add ref. 1 Chit. Rep. 400. (a.)

CHAP. III.

To n. d, p. 55, add: And see 1 Dowl. & Ryl. 14.

After 'aforesaid,' p. 55, last line but two, add: And where a person, not having been admitted an attorney of the Common Pleas, had acted as such, by suing out process, the court would not grant an attachment against him, but left the party to sue for the penalty given him by the statute 2 Geo. II. c. 23. § 24. 6 Moore, 70.

After the paragraph ending with 'to do,' p. *57, the author inserts two statutes of Geo. IV. enabling graduates of the universities of Oxford, Cambridge and Dublin to practice as attorneys after an apprenticeship of three years, instead of five years, the term which all others are bound to serve.

After 'time,' l. 13, p. 57, the author adds: And in the last of these acts, (st. 3 Geo. IV. c. 12. § 8.) there is a clause allowing persons to make and file affidavits of the execution of articles of clerkship, within a limited time, although the persons whom they served, have neglected to take out their annual certificates. Where the original articles of clerkship had been lost, the court of K. B., on motion, ordered that the master should be at liberty to enrol a copy of them. 3 Barn. & Ald. 610.

To note d, p. *58, the author adds: 59 Geo. III. c. 11. 60 Geo. III. & 1

Geo. IV. c. 10. 1 & 2 Geo. IV. c. 5. 3 Geo. IV. c. 12. and 4 Geo. IV. c. 1. which latter act has been holden to be *prospective*, as well as *retrospective*, extending to those persons who may be in default, during the time for which it is made, and not being limited to those who had incurred penalties or disabilities before it passed. 2 Barn. & Cres. 34.

Pa. 57, *58, *59, last line, after *consequences*, add: And where a clerk had been articulated to an attorney in the country, and the indentures had been sent up to *London* to be enrolled in the Master's Office, pursuant to the statute, and after the clerkship had been served, no trace of the indentures could be discovered in the Master's Office, the court refused to admit him; although it appeared from the books of the town agent, that a clerk of the latter had paid the fees payable in the Master's Office upon the enrolment, at the time when it was supposed to have taken place. 2 Dowl. & Ryl. 439. 1 Barn. & Cres. 264. S. C.

After 'solicitor,' l. 31, p. 60, the author adds: By the above statute, it is necessary that a clerk, in order to be admitted an attorney, should actually serve *five* years under articles: Therefore, where a clerk had served part of his time with a master who had left the country, and before his articles were assigned to another master, an interval of *ten* months had elapsed, during which he was not serving under any articles, but, under the assignment, he served the remainder of the time specified, the court would not allow him to be admitted, until he had served out the *ten* months under new articles. 2 Chit. Rep. 61.

After 'master,' l. 34, p. 60, the author adds: So, where a clerk to an attorney held, during the term for which he was bound, the office of surveyor of taxes under the crown, the court of K. B. determined that he could not be considered as having served his whole time and term in the proper business of an attorney; and upon that ground, ordered him, after he had been admitted, to be struck off the roll. 5 Barn. & Ald. 538.

After 'thereof,' l. 30, p. 61, *62, the author adds: An articulated clerk, having served part of his clerkship with an attorney who *died* before the expiration of his term, is it seems at liberty, even after an interval of *six* years, to serve the remainder of his clerkship with another attorney, with a view to his admittance. 1 Dowl. & Ryl. 14. And the court of K. B. granted a rule to discharge an articulated clerk, where the attorney to whom he was bound had become *bankrupt*, and absconded; and directed the rule to be served at the last place of abode of the attorney, and on the clerk to the commission of bankruptcy and also to be stuck up in the K. B. office. 1 Chit. Rep. 558. in notis. 2 Chit. Rep. 62. S. C. This court has also a summary jurisdiction over matters in difference between attorneys and their clerks: and therefore, where a clerk had misconducted himself, and left the service of the attorney to whom he was articulated, at the end of a year and a half, and the latter refused to take him back in consequence of his previous misconduct, the court referred it to the master, who decided that a portion of the premium should be returned; and this decision was confirmed by the court, though the point in question had been decided otherwise in a suit in the Exchequer. 3 Barn. & Ald. 257. 1 Chit. Rep. 694. S. C. But the court refused to compel an attorney to execute an assignment of articles of clerkship, where the clerk had been guilty of criminal conversation with the attorney's wife, even though the attorney had promised to assign him over. *Ex parte Briggs*, M. 22 Geo. III. K. B.

It is a rule, that "no person who shall enter into articles with an attorney or attorneys, under such articles, for a longer time than *one* year of his clerkship; and any such service to an agent or agents, beyond that time, shall not be deemed good service." R. T. 31 Geo. III. K. B. 4 Durnf. & East, 379. But, by the st. 1 & 2 Geo. IV. c. 48. § 2., "if any person,

bound by contract in writing to serve as a clerk for the space of *five* years, in manner mentioned in the therein recited acts, shall actually and *bona fide* be and continue as pupil to any practising barrister, or to any person *bona fide* practising as a certificated special pleader, in *England or Ireland*, for any part or parts of the said term of five years, not exceeding *one* year, it shall be lawful for the judge, or other sufficient authority, to whom such person shall apply to be admitted as attorney or solicitor, or upon affidavit or affirmation of such clerk, and of such barrister or special pleader, to be duly made and filed, and upon being satisfied that such person, so applying for admission, had actually and really been and continued with, and had been employed as pupil by such practising barrister or special pleader as aforesaid, (but not otherwise,) to admit such person as attorney or solicitor, in like manner as is now done in cases where the clerk has served part of the term of his clerkship, with the agent of the person to whom he has been bound."

After 'admission,' l. 8, p. 63, the author adds: And, in the K. B. where an attorney's clerk has served part of his time with one attorney, and part with another to whom the articles were assigned, the name of the assignee must be inserted in the notice of intention to apply for admission. 1 Chit. Rep. 556.

After 'equity,' l. 2, p. 67, the author adds: An admitted attorney of the court of King's Bench may sue out a commission of bankrupt, and maintain an action for his fees and disbursements thereon, although he be not a solicitor in Chancery. 1 Barn. & Cres. 158. 2 Dowl. & Ryl. 302. S. C.

To note g, p. 67, after § 11, the author adds: And see 5 Barn. & Ald. 824. 2 Dowl. & Ryl. 64. 1 Barn. & Cres. 160. 2 Dowl. & Ryl. 307. S. C. 1 Barn. & Cres. 270. 3 Dowl. & Ryl. 263. (a.) S. C.

After 'court,' &c.' l. 8, p. 71, the author adds: And it is no ground of objection to bail, 2 Chit. Rep. 98, nor for cancelling a bail-bond, 1 Dowl. & Ryl. 215, or setting aside proceedings, that the attorney by whom the bail was put in, or who sued out the writ, had neglected to take out his certificate.*

To note h, p. *73, the author adds: 2 Dowl. & Ryl. 238. in which latter case it was holden, by the court of King's Bench, that an attorney who has discontinued practice after his last certificate expired, may be re-admitted, without payment of any fine, or arrears of duty.

To 'duties,' at the end of the paragraph, p. *73, the author adds: An attorney may be re-admitted on the last day of term, when notice has been stuck up all the term. 1 Chit. Rep. 557. *in notis*.

After 'abatement,' l. 16, p. 73, *74, the author adds: This distinction, however, seems to be now abolished: and, in a late case, the court of K. B. stayed the proceedings, in an action brought in that court against an attorney of the C. P. who gave notice of his privilege, but neglected to plead it, after the plaintiff had signed judgment for want of a plea. *Gwynne v. Tolderry*, one, &c. H. 54 Geo. III. K. B. So, where an attorney of the C. P. was arrested, on an attachment of privilege, at the suit of an attorney of the K. B. the latter court ordered the bail-bond to be delivered up to be cancelled, on his entering a common appearance. *Beck v. Lewin*, T. 56 Geo. III. K. B. But where an attorney, having been arrested in the beginning of *January*, put in bail above, and did not apply to the court for his discharge until the 3d of *February*, the court held the application to be too late. 1 Chit. Rep. 188. 2 *Id.* 396. S. C. A defendant who is sued by *bill*, as an attorney of the court of K. B., not being such, may set aside the proceedings as irregular. 5 Maule & Sel. 324.

* And the circumstance that the plaintiff's cause has been conducted by an attorney who has not complied with these statutes, does not deprive the plaintiff of his right to full costs against the defendant. 3 *Bingh.* 9 C. B.

To the word 'doubt,' l. 2, p. 79, add as a note: An attorney is not to lose the amount of his bill on account of any error in the execution of his duty, being such an error as a cautious man might fall into; but if the charges contained in his bill are brought upon the client by his inadvertence, he cannot recover them in an action. 2 *Carring. & Payne, N. P. R.* 113.

After 'same,' l. 10, p. 81, *82, the author adds: It has been doubted, whether the affirmation of a *Quaker* is admissible, to call upon an attorney of this court, to answer the matters of an affidavit: 1 *Dowl. & Ryl.* 121. and the true distinction, to be collected from all the cases upon the subject, seems to be this; that if the object of the suit or proceeding be to recover a debt, or to give to a party any legal civil right, the affirmation of a *Quaker* is admissible; and actions on penal statutes are to be considered as actions for debts; but that where the object is not to give to the party any legal civil right, but to punish a person who has done something wrong, the affirmation of a *Quaker* is not admissible. *Id.* 124. *per Bayley, J.*

After 'treated of,' last line, p. 81, *82, *83, the author adds: In general, he must satisfy the court that he ought to be restored; *Ex parte Sambridge*, T. 25 Geo. III. K. B. and see 1 *Chit. Rep.* 692: and, on one occasion, *Ex parte Vaughan*, E. 45 Geo. III. K. B. *Ante*, 74. they required the like notice to be stuck up, and entered at the judges' chambers, as upon an original admission. The court will also make him consent to take no advantage of his privilege, in any action then depending. *Doug.* 114. *Barnes*, 42. But the statute 37 Geo. III. c. 90. § 31. being confined to attornies who have neglected to take out their certificates, does not apply to those who have been struck off the roll at their own instance; and of course, the latter may be re-admitted, without paying any fine or arrears of duty. 2 *Barn. & Ald.* 315. (a.)

After '*assumpsit*,' l. 10, 11, p. 89, the author adds: This action lies for business done in other courts, as well as in the court of which the plaintiff is an attorney. *Cro. Car.* 159, 60. But an attorney cannot recover a charge for conducting a suit, in which the party charged has not had the benefit of the attorney's judgment and superintendence. 1 *Bing.* 13. and see 3 *Campb.* 451. 3 *Stark. Ni. Pri.* 75. It is also said, that an attorney ought not to prosecute an action, to be paid in gross; for that will be champerty: *Com. Dig. tit. Attorney*, (B. 14.) *Hob.* 117. and see 2 *Atk.* 298. 4 *Bro. Ch. Cas.* 360. 18 *Ves.* 313. in *Chan.* 2 *Marsh.* 273. And an undertaking by a third person, to pay an attorney the further expenses of business already commenced, must be in writing, by the statute of frauds. 1 *Stark. Ni. Pri.* 270.

After 'difference,' last line in p. 96, *97, the author adds: And when a rule has been served for taxing an attorney's bill, the court of King's Bench will not grant an attachment against the attorney, for not paying the balance due to his client, until the costs have been taxed, though the balance is admitted, and it has been agreed to dispense with the taxation. 2 *Chit. Rep.* 66.

After 'them,' l. 4, p. *101, the author adds: And a solicitor has no lien in equity against a remainder-man, on deeds put into his hands by tenant for life. 2 *Scho. & Lef.* 279. and see 13 *Ves.* 161, 2. 16 *Ves.* 258. 275. 18 *Ves.* 282. 294. 2 *Scho. & Lef.* 279, as to the lien of a solicitor in equity, on papers in his possession.

After 'costs,' p. 102, 3, last line, the author adds: And in like manner where the plaintiff, after judgment recovered, settled the action with the defendant, and employed a new attorney to enter up satisfaction on the record, the court held, that the defendant was entitled to be discharged out of custody; although the lien of the plaintiff's attorney for the costs had not been satisfied. 4 *Barn. & Ald.* 466.

Add as a note to 'money,' 5th l. from bottom, p. 106, *107: In an action against an attorney for neglect in the management of a suit, it is not necessary

to aver that the plaintiff had paid or secured him a fee; an averment that the defendant undertook to prosecute the suit for a sum thereafter to be paid, is sufficient. 3 *Bibb's Ten. Rep.* 517.

In such an action, the amount of the debt in the first suit is not the criterion of damages, but the amount of damages sustained is a question of fact for the jury. *Id. ibid.*

When an attorney undertakes to collect a debt, he is bound to sue out all process necessary to the object; he is therefore liable in an action if he neglects to sue out seasonably a *scire facias* where *non est inventus* is returned to a *ca. sa.* 15 *Mass.* 316. And he cannot excuse himself in such case, unless he give notice to his client and request specific instructions, where he has doubts of the expediency of the measure. *Id. ibid.*

If an attorney bind his client without his knowledge or consent, he is answerable to him for any damage he may thereby sustain. 1 *Pick.* 462.

If an attorney have the money of a client in his hands, and pay such money to the credit of his private account at his banker's, and that banker fail, he will be liable for the amount to his client, although he have done so *bonâ fide*, and have a large sum of money of his own at that banker's. His proper mode would be, to open a new account with a banker in his own name, but to the credit of A. B.'s estate. 2 *Carring. & Payne, N. P. R.* 59.

Add as a note to 'champerty,' third line from the bottom, p. 106, *107: An agreement between attorney and client, that the former shall receive for professional services a certain proportion of the sum recovered in a suit, is void—such agreement coming within the description of champerty. 1 *Pick. Mass. Rep.* 415.

After 'attorney,' l. 4, p. 107, the author adds: And a defendant, having appeared to the action by one attorney, cannot, in the same cause, make any application to the court by another, without having obtained an order for changing his attorney. 1 *Barn. & Cres.* 654.

After 'writs, &c.' l. 26, p. 110, *111, the author adds: And an attorney employing an agent to do business for his client, is *primâ facie* liable to the agent for his bill, although the latter know the business to be done for the client; but to whom the credit was given, is a question for the jury. 2 *Barn. & Cres.* 11. 3 *Dowl. & Ryl.* 195. S. C.

CHAP. V.

After 'outlawed,' l. 34, p. 117, add: But the costs of a special original were allowed, in an action brought on a bond, the penalty of which was more than *fifty* pounds, though the sum found due was only *twenty* pounds. 2 *Chit. Rep.* 148.

Instead of the ref. d, p. *120, insert: 1 *Sel. Pr.* 272. *Marston v. Bell, H.* 28 *Geo. III. C. P. Imp. C. P.* 271. 1 *Taunt.* 120.

To ref. h, p. *120, add: And see further, as to the *teste* of original writs, 1 *Madd. Chan.* 15.

Add as a note to 'process,' l. 35, p. 125, 126: In the *K. B.*, a defendant served with a copy of process by original, has eight days from the quarto die post of the return of the process, to enter an appearance. 3 *Barn. & Cres.* 110.

To ref. k, p. *127, add: 2 *Taunt.* 399. 1 *Marsh.* 75. 2 *Chit. Rep.* 357. 6 *Price*, 34. 1 *Bing.* 316.

After 'only,' l. 4, p. *128, add: And the costs of a *distringas*, &c. were directed to be taxed, and that the sheriff should sell the issues to pay such

costs, though the defendant had appeared after the issues were levied, but before they were sold. 2 Chit. Rep. 36.

To ref. a, p. 129, add: And see 5 Price, 522.

To ref. c, p. 132, add: But see 3 Price, 263. Id. 266. n. 5 Price, 522. 639. *Post*, Chap. VIII. by which it seems, that the ancient practice of issuing writs of *distringas*, after service of the *venire facias*, in the Exchequer, still continues.

To ref. e, p. 132, add: And see 8 Taunt. 57. 171.

To ref. f, p. 132, add: 8 Taunt. 57. 171. 3 Moore, 23. 8 Taunt. 693. S. C.

CHAP. VI.

After 'bankrupts,' l. 15, p. 135, add: A bond given under the above statute, is analogous to a recognizance of bail in error: and therefore, where a member of parliament had given a bond, with two sureties, conditioned for payment of the sum to be recovered in the action, and before trial became bankrupt, the court refused to order the bond to be delivered up to be cancelled. 3 Barn. & Ald. 273. 1 Chit. Rep. 731. S. C. and see 5 Barn. & Ald. 250.

To note a, p. 136, add: But see 5 Maule and Selw. 321. and see 2 Chit. Rep. 633, 9.

After 'peer,' l. 4, p. 136, add: But the motion for this purpose must be made as soon as may be, and before interlocutory judgment; *Lady Napier's case*, T. 21 Geo. III. K. B.

To ref. e, p. 136, add: 7 Taunt. 679. S. C.

After 'county,' l. 36, p. *137, add: The summons, upon process by original writ, against a member of parliament, omitted to describe him as having privilege of parliament, and the notice at the foot stated, that in default of his appearance, on the return day of the writ, the plaintiffs would cause an appearance to be entered for him; and the court held, that the summons was sufficient. 5 Maule & Sel. 321.

Instead of note h, p. *141, the author has substituted the following one: For the proceedings in general on these statutes, see 2 Wms. Saund. 374. (1.) to 380. (15.) For the beginning of a declaration against *hundredors*, on the statutes of hue and cry, &c. see Append. Chap. VI. § 30. For the forms of declarations thereon, see 3 Chit. 460. 462, 3. For the evidence in support of them, see Peake's Evid. 277, &c. Phil. Evid. 2 V. 161, &c. and for cases determined on the riot acts, see Doug. 699. 5 Durnf. & East, 14. 7 Durnf. & East, 496. 1 East, 615. 636. 1 Price, 343. Holt Ni. Pri. 201. 203. (n.) 1 Barn. & Ald. 487. 3 Chit. 463, 4. (n.) Moore Dig. tit. Riot; and for those on the *black act*, see 1 Durnf. & East, 71. 2 Durnf. & East, 255. 3 East, 400. 457. 8 East, 173. 3 Moore, 319. 3 Chit. 460. (a.) 2 Barn. & Cres. 254. Moore Dig. tit. *Black act*.

CHAP. VII.

After 'required,' l. 8, p. 150, the author adds: The writ of *exigent*, upon an outlawry, must be in the hands of the sheriff, at the time the defendant is demanded; and therefore, where a sheriff returned to a writ of *exigent*, and *allocatur exigent*, that he had demanded a defendant at the hustings, upon

See several days, on *three* of which the writs could not by possibility have been in his hands, the court held that the returns were irregular. 3 Dowl. & Ryl. 55.

After 'made,' l. 7, p. 151, the author adds: But where the proclamations returned by the sheriff, could not by possibility have been made between the day of issuing the writ and the day of the return, inasmuch as there was no county court or general quarter sessions of the peace held, at which the defendant could have been proclaimed, while the writ was running, the court seemed to think the proceedings were irregular.† 3 Dowl. & Ryl. 55.

CHAP. VIII.

To 'process,' l. 30, p. 167, *168, add as a note: The affidavit in support of a rule to discharge the defendant out of custody, upon the ground that the writ described him by the initial of his christian name only, must set out the defendant's christian name at full length in the title. 8 Dowl. & Ryl. 423.

CHAP. IX.

To the word 'boundaries,' l. 13, p. 190, add as a note: Or that the place where it was served is not on the confines of the county into which it issued. 3 Barn. & Cres. 158.

After 'post,' l. 19, p. 190, the author adds: Where a *latitat* has been served by mistake on a wrong person, the right person may afterwards be served with an *alias capias* issued thereon. 2 Barn. & Cres. 95. 3 Dowl. & Ryl. 254. S. C.

After 'process,' l. 21, p. 190, the author adds: But where the defendant, on being served with a copy of process by the name of *John*, observed his name was *Nicholas*, upon which the person who served it was about to alter the name, when the defendant said, "never mind; I am the person, and will take care of it;" the court notwithstanding held, that the service was irregular, and set it aside, but without costs. 1 Chit. Rep. 319.

In a joint action against two or more defendants, each of them must be served with a copy of the process. Pr. Reg. 351.

After 'only,' l. 22, p. 190, *191, the author adds: Whenever the defendant would take advantage of a mistake in the copy of process, or notice. to appear thereto, he must produce the copy served, and swear that he was served with no other. Barnes, 298. and see 1 Kenyon, 374. And where there is an irregularity in the notice to appear to, or in the service of process, the rule should be to set aside such service, and not the process itself. 9 East, 528. 5 Taunt. 652. (a.) 664. 1 Chit. Rep. 384. 1 Bing. 65. 1 Chit. Rep. 616. (a.)

After 'amount,' l. 17, p. 194, the author adds: But a defendant may be arrested on a *guarantee*, or undertaking to be answerable to a certain amount, for goods sold to a third person, in the event of his failing to pay for them. 9 Price, 115.

† Where the third proclamation was made at the door of the church of the parish of which the defendant was described to be in the writ, and in the bond upon which the action was brought, but where he did not reside at the time when the proclamation was made, the court reversed the outlawry as for want of proclamations, and ordered bail to be taken to pay the condemnation money. 3 Barn. & Cres. 529.

Add as a note to 'arrest,' l. 2, p. 196: Particularly where the plaintiff knew the amount of the balance due him. 4 *Dowl. & Ryl.* 653.

To the same word the author adds: And, at any rate, if the balance did not constitute an arrestable debt, the defendant would be entitled to his costs, under the statute 43 Geo. III. c. 46. § 3, as having been arrested and held to bail, without any probable cause. 5 Barn. 513. 1 *Dowl. & Ryl.* 67. S. C.

After 'copy,' l. 33, p. 201, *202, the author adds: So in the Common Pleas, where, on an affidavit of debt sworn before and filed with the filacer for *Devonshire*, a *capias ad respondendum* issued to the sheriff of that county against the defendant, who not being found there, an office copy of such affidavit was filed with the filacer for *London*, on which another *capias* issued, directed to the sheriffs of *London*, under which the defendant was arrested, the court held, that this was irregular; for, by the terms of the statute, an affidavit must be made before a judge, or commissioner of the court authorized to take affidavits, or before the officer who issues the process or his deputy, and in this case therefore, the affidavit should have been sworn before and filed with the filacer in *London*. 8 Taunt. 242. 2 Moore, 192. S. C.*

Add as a note to 'crime,' l. 2, from bottom, p. 200, 1: A plaintiff convicted of a conspiracy, is not incompetent to make an affidavit to hold a defendant to bail. 4 *Dowl. & Ryl.* 144.

Add as a note to the words 'bank notes,' l. 25, p. 203. *203: An affidavit to hold to bail, made before a British consul in a foreign country, stated that the defendant was indebted to the plaintiff in a certain number of pounds sterling: Held by 3 Js. that the affidavit was insufficient, inasmuch as it did not appear with certainty whether defendant was indebted in British, or in Irish sterling money. 4 Barn. & Cres. 886. 7 *Dowl. & Ryl.* 478. S. C. ABBOT, C. J. *dissentiente*. In the same case, it is made a question whether a British consul in a foreign country has authority to administer an oath.

After 'stated,' in the last line of p. 202, *203, the author has added: An affidavit to hold to bail on an Irish judgment, must shew the value of the sum recovered in Irish money.† 2 Chit. Rep. 16.

To 'interest,' l. 32, p. 204, *205, add as a note: The affidavit in debt on bond must shew that the bond is *due and payable* at the time of the arrest, otherwise the defendant will be discharged on common bail. 7 *Dowl. & Ryl.* 232.

After 'condition,' l. 18, p. 205, the author adds: So, where it was stated in the affidavit, that the defendant was indebted "for the use and occupation of a certain dwelling house, &c. of the plaintiff, held and enjoyed by the defendant as tenant thereof," without saying he was tenant to the plaintiff, it was deemed sufficient. 9 Price, 322.

After 'action,' l. 36, p. 206, *207, the author adds: And, in that court, an affidavit stating that the defendant was indebted to the plaintiff, "upon and by virtue of a certain charter-party of affreightment, bearing date, &c. for and

* 3 *Bingh.* 39. *accor.* If, instead of a *testatum* a second *capias* is issued into another county, a new affidavit must be filed with the filacer of the second county. *Id.* Otherwise where the filacer for the two counties is the same person. *Id.* 2 Taunt. 161. *Boyd v. Durand.*

† As to an affidavit made by a foreigner in England, who does not understand the English language, if in the jurat it be certified by the signer of the bills of Middlesex that the affidavit was interpreted by J. C. professor of languages, (he having first sworn that he understood the English and French languages) to the deponent, who was afterwards sworn to the truth thereof: it was held to be sufficient, without stating either that the person who made the affidavit understood either the French or English language, or that the interpreter was sworn duly to interpret the oath and affidavit. 4 Barn. & Cres. 358.

on account of the hire of a ship, let to hire by the plaintiff to the defendant, and by him taken for a certain voyage from ——— to ———," was deemed sufficient. 1 Bing. 242.

To 'discretionary,' l. 29, p. 213, *214, add as a note: If a defendant be held to bail for a debt which is clearly and manifestly not due, it seems the court will discharge him out of custody; but in general they will not try the merits on affidavits. 6 Dowl. & Ryl. 24. For instances in which this was done, see the judgment of Abbot, C. J. *Ibid.*

After 'debts,' l. 12, p. 216, the author adds: So where the servant of an ambassador did not reside in his master's house, but rented and lived in another, part of which he let in lodgings; the court held, that his goods in that house, not being necessary for the convenience of the ambassador, were liable to be distrained for poor rates. 1 Barn. & Cres. 554. 2 Dowl. & Ryl. 833. S. C. And where the wife of an ambassador's secretary was arrested, upon a writ issued against her and her husband, the court refused to quash the writ, though the husband swore, that before and at the time of the arrest, he was in the actual employment of the ambassador, and in daily attendance upon him, in writing dispatches and other official documents; it not being sworn that he was a domestic servant, or employed in the ambassador's house. 3 Dowl. & Ryl. 25.

After 'woman,' l. 19, p. 220, *221, the author adds: So that court would not, upon a summary application, cancel the bail bond, and permit the defendant to enter a common appearance, where a great part of the debt sued for was contracted before she disclosed her coverture, and it appeared that she had acted with great duplicity in eluding payment, and, at the time of the application, was residing out of the jurisdiction of the court. 1 Bing. 344.

After 'marriage,' l. 22, p. 220, *221, the author adds: But where a married woman had been arrested as *acceptor* of a bill of exchange, at the suit of an administratrix, to whose intestate the bill was indorsed, the court ordered the bail-bond to be delivered up to be cancelled, on an affidavit that the drawer and intestate knew, at the time the bill was drawn accepted and indorsed, that the defendant was married. 2 Moore, 211. If a plaintiff knowingly arrest a married woman, the court of Common Pleas will make him pay the costs of the motion for her discharge: 3 Taunt. 307. And, in the Exchequer, the court would not order a *feme covert* to pay costs, nor impose any terms, on her being discharged, although it was sworn that she was carrying on business on her own separate account, and that the action was brought for goods furnished to her in the way of her trade.

After debt, l. 35, p. 222, *223, the author adds: A witness is not privileged from arrest by his bail, on his return from giving evidence. 3 Stark. Ni. Pri. 132. And where he has absconded from his bail, he may be retaken by them, even during his attendance in court. Dowl. & Ryl. Ni. Pri. 20. and see 1 Sel. Prac. 180.

To 'act,' l. 14, p. 234, 5, add as a note: *Accord.* 4 Dowl. & Ryl. 154. K. B. where it was held that a defendant who had given a promise to pay a debt as to which he had been discharged under an insolvent act, could not be arrested and held to bail upon such promise.

After 'discharge,' l. 18, p. 237, the author adds: And where the return to a writ of *latitat* stated that the defendant was insane, and could not be removed without great danger, and continued so till the return of the writ, the court of K. B. refused an attachment against the sheriff. 4 Barn. & Ald. 279.

CHAP. XI.

To 'only,' l. 14, p. 244, 5, add as a note : 'The party is not compelled to rely on such a bond, but may say to the sheriff, if you take only one security, I shall resort to you. It might lead to mischievous consequences if I were to decide otherwise, and sheriff's officers would be under frequent temptation to receive money for taking only one security.' *Per Best, C. J. 2 Bingh. 227. and see the case.*

Add as a note to 'damages,' l. 44, p. 250, *251 : An action lies for maliciously holding a party to bail, although he is never arrested, but is told that there is a writ out against him, and he goes to the sheriff's officer and gives bail. 2 *Carring. & Payne*, 605. *where see the form of a declaration in such case.*

After 'negligent,' l. 16, p. 258. the author adds : And where the defendant was already a prisoner in the county gaol, when the plaintiff's writ issued against him, and afterwards escaped, the court of Common Pleas refused to set aside an attachment against the sheriff, for not bringing in the body, and drive the plaintiff to bring his action against the sheriff for the escape ; in which case the amount of the damages might be inquired into, and the sheriff be thereby enabled to have his remedy over against the gaoler, in case a verdict should be obtained against him. 1 *Bing. 156.*

CHAP. XII.

After 'amended,' l. 27, p. 267, 8, the author adds : Where the plaintiff, having sued out a writ against *four* defendants, for separate cause of action, and filed separate declarations against *three* of them conditionally, and given three separate rules to plead, afterwards entered a common appearance, according to the statute, for all the *three* defendants, and signed three separate interlocutory judgments for want of a plea, the court of King's Bench held this to be irregular : For, by declaring separately against the three defendants, the plaintiff had made three separate causes, and had thereby elected to proceed separately ; and by the practice of the court, he ought to have entered a *separate* appearance for each of them. 5 *Barn. & Ald. 392. 1 Dowl. & Ryl. 545. S. C.*

After 'debts,' l. 15, p. 270, the author adds : A person resident in *England* has been admitted to be bail, in respect of mortgage money secured on an estate in *Ireland*, *Per Cur. M. 42 Geo. III. K. B. but see 1 Sel. Pr. 161. where it is said*, that property in Scotland is not sufficient, because it is not liable to the process of the court : and, in the Common Pleas, it seems that the court will permit the bail to justify as tenant by the curtesy of lands in the *Isle of Man*, without an affidavit or other evidence that the law of tenancy by the curtesy prevails there. 8 *Taunt. 148.* But a *copyhold* estate of the bail, in right of his wife, is not sufficient to qualify him to become bail. 2 *Chit. Rep. 97.* And though it has been ruled in the bail court, that long beneficial *leases*, at small rents, are sufficient to entitle bail to justify. *Id. 96. Per Bayley. J.* yet this point does not seem to be settled. *Id. Ibid.*

After 'fresh bail,' l. 7, p. 271, the author adds : The *husband* of a defendant, who had married after the arrest, and before the return of the writ, has been allowed to become bail. 2 *Chit. Rep. 94.*

To 'defendant,' l. 10, p. 271, add as a note : So the sheriff may put in bail

before the return of the writ; *Per Borrough, J. 2 Bing. 271. C. P.* for the purpose of having the defendant surrendered. The advantage of this course is to exonerate himself, where the surety in the bail bond has become insolvent.

Note to 'term,' l. 13, p. 279; 280: If bail do not justify in four days after exception, the plaintiff is at liberty to proceed on the bail bond, although from the bail having been put in sooner than was necessary, the rule for bringing in the body has not expired, and the sheriff is not liable to an attachment. 4 *Barn. & Cres. 864. K. B.*

After 'contrary,' l. 15, p. 282, 3, the author adds: And where one of the sureties in a *replevin* bond was a material witness in the cause, the court granted a rule for substituting another surety in his place, upon giving the defendant's attorney notice of such rule. 1 *Bing. 92.*

After 'notice,' l. 24, p. 286, 7, the author adds: An affidavit that *A.* and *B.* and each of them, were worth double the sum sworn to in the affidavit to hold to bail, exclusive of all debts due to any other person, is sufficient. 2 *Chit. Rep. 95.* And the affidavit of justification need not be sworn before the same commissioner, as the affidavit of taking the bail. *Id. 91.*

Note to the same: A clerk in a mercantile house, described in the notice of justification as "gentleman," was rejected as bail, merely on account of the misdescription. 7 *Dowl. & Ryl. 772.*

Bail rejected where he was to receive a commission on the amount for which he proposed to justify. 7 *Dowl. & Ryl. 783.*

After 'affidavits,' l. 33, p. 286, 7, the author adds: And, in the Common Pleas, if the justification of bail by affidavit be opposed by another affidavit, stating the insolvency of one of the bail, the court will not allow the matters of the latter affidavit to be answered. 5 *Moore, 482.*

After 'debts,' l. 13, p. 295, the author adds: A bail has also been rejected, on the ground of insufficiency, who admitted that he had been bail before, but did not know in how many actions, or for what sums; *Lofft, 72. 194.* or swore, that he did not know whether he had been arrested or not, during the space of two years; 2 *Chit. Rep. 95.* or who had suffered his father to receive parochial relief, *Id. 78.* or his children to be in the workhouse, without assigning a sufficient reason; *Id. 77.* or because his name was on the books of the King's Bench prison, as a prisoner, and the action, though supersedeable, was not actually superseded. *Per Cur. M. 21 Geo. III. K. B.* And it seems, that when the court orders the bail to submit their property to inspection, in order to ascertain its sufficiency to enable them to justify, the plaintiff may cause it to be appraised by a broker. 2 *Chit. Rep. 80.* But it is no objection to bail, that he had been transported *thirty* years before. 2 *Chit. Rep. 98.* And it seems, that the circumstance of not knowing the defendant, being only a mark of suspicion, may be explained away. *Id. 97, 8.* So, it is no objection to bail, that they are liable as indorsers of the bill of exchange *on which the action is brought.* 2 *Bos. & Pul. 326.* 1 *Chit. Rep. 287. 305.* But it is said to be a general rule, that so long as there are outstanding dishonoured bills, which are not renewed, nor the right of proceeding upon them suspended, a person liable thereon cannot justify as bail. 2 *Chit. Rep. 79.* And a bail was rejected, who had been bail to the sheriff in a former action, and not excepted to, it appearing that his property was not sufficient for both actions; though time was allowed to add and justify another bail. 2 *Blac. Rep. 956, 7.* It has been doubted, in the Common Pleas, whether it is a sufficient objection to bail, that he lives within the verge of the court; but it seems that this, without other suspicious circumstances, such as his being much in debt and the like, is not sufficient. 1 *Sel. Pr. 171.*

After 'but,' l. 36, p. 296, 7, the author adds: From a late case it seems, that nothing but an unforeseen accident of a serious nature will, in that court,

be deemed a sufficient excuse for the nonattendance of the bail, or a good ground for allowing time to substitute other persons in their stead. 1 Bing. 359. And

After 'judgment,' l. 8, p. 306, the author adds: And the render may be made not only by the bail put in by the defendant himself, but also by such as are put in by the sheriff, or his bail, for their own indemnity: And after final judgment, we have seen, the defendant's bail may put in fresh bail, for the purpose of rendering him. When bail above are put in, the principal is supposed to be delivered into their custody by the court; 4 Inst. 178. 2 Hawk. P. C. 88. as is evident from the language of the bail-piece, which states him to be delivered to bail, &c.: and it is said, that they have their principal always in a string, which they may pull whenever they please, and render him in their discharge. 6 Mod. 231. The bail may also take their principal on a Sunday, in order to render him; and they may even take him during his examination before commissioners of bankrupt; or going to a court of justice. 1 Sel. Pr. 180. So, they may justify entering the house of a third person, in which the principal resides, the outer door being open, in order to seek after, for the purpose of rendering him, although the principal was not in the house at the time. 2 H. Bl. 120. When the principal is taken, one of the bail, it is said, must always remain with him; for they cannot depute their right of custody to another, without the defendant's consent in writing, till he be rendered; 1 Sel. Pr. 180. but it has been determined, that a third person may assist the bail in taking their principal, and may lawfully detain him, although the bail do not continue present. 3 Taunt. 425.

To 'prison,' l. 17, p. 310, add as a note: Where the principal is surrendered in discharge of his bail, and is thereupon committed to the custody of the sheriff by order of court, it is the duty of the sheriff to procure a copy of the order of court, and not the duty of the plaintiff to deliver it to him; and if the sheriff allow the principal to go at large, because such order has not been delivered to him, it is an escape. 2 Mass. 547. *Randal v. Bridges*.

To 'charges,' l. 33, p. 311, 12, add as a note: Where a defendant was rendered after judgment, in discharge of his bail, but notice thereof was not given until after execution had been regularly issued and executed against the bail, the court set aside the execution, and entered an *exoneretur* on the bail-piece on payment of costs. 3 Barn. & Cres. 112.

To 'chambers,' l. 29, p. 312, 13, add as a note: A cause commenced in the C. P. was removed by error unto the K. B. where judgment was affirmed against the defendant who then brought error to the House of Lords. The defendant, while the cause was in the K. B., having surrendered himself to the prison of that court: Held, that the bail might, notwithstanding, while the appeal was yet pending in the House of Lords, enter up an *exoneretur* upon the recognizance of bail remaining in the C. P. 2 Bingham, 18. C. P.

To 'exchange,' l. 10, p. 314, add as a note: After issue joined in *assumpsit* for goods sold, the plaintiff added a special count for not delivering a bill of exchange, and having recovered on that count only: it was held, that the bail were discharged. 4 Dowl. & Ry. 619. See also 4 Dowl. & Ry. 243.

CHAP. XIII.

After 'costs, &c.' l. 13, p. 331, the author adds: Where the sheriff had untruly returned to a *capias*, that he had taken the defendant, whose body remained in prison under his custody, the court of Common Pleas refused to allow him to amend his return, by striking it out, and making another, according to the fact. 1 Bing. 156.

After 'officer,' l. 15, p. 338, the author adds: And in general, the court will not set aside an attachment against the sheriff on the ground of delay, unless there have been gross laches on the part of the plaintiff, to the prejudice of the sheriff.* 2 Chit. Rep. 58.

CHAP. XV.

After 'court,' l. 33, p. 400, 1. the author adds: A *certiorari* always lies to remove proceedings under penal statutes, unless it be expressly taken away; but an *appeal* never lies, unless it be expressly given by the statute. 3 Dowl. & Ryl. 35. and see *id.* 275. 301. 2 Barn. & Cres. 228. 3 Dowl. & Ryl. 306. S. C.

Add as a note to the word 'not,' l. 13. p. 401, 2: It is a general rule, that a *certiorari* does not lie to remove a cause from an inferior court, after judgment signed there; especially where the defendant suffered judgment by default. 7 Dowl. & Ryl. 769.

Add as a note to 'below,' l. 20, p. 407: The return to a writ of *certiorari* to remove proceedings from an inferior court into the K. B. setting out a copy of the record, but not returning the record itself, is irregular, and the court quashed the writ on motion. 6 Dowl. & Ryl. 497.

Add as a note to 'there,' l. 2, from bottom, p. 414, 15: So, where a defendant removes proceedings from an inferior court by *certiorari*, the plaintiff is not bound to follow the suit. In such case, if the defendant sign judgment of *non-pros* for want of a declaration, he is irregular, and is not entitled to costs. 7 Dowl. & Ryl. 104.

CHAP. XVI.

Add as a note to 'severally,' l. 9, p. 423: This rule [where several defendants are held to bail for a joint cause of action they ought to be declared against jointly] applies to contracts, and does not hold in torts; therefore when two are held to bail for an assault and battery, the plaintiff may declare against one. 5 Dowl. & Ryl. 622.

After declaration, l. 8, p. 431, the author adds: And where a cause of action arose on the 29th January, being the first day of the 4th year of the reign of his present majesty, and the declaration was entitled "*Saturday* next after fifteen days of *Saint Hilary*, in *Hilary* term, in the *third* year of King George the Fourth," which would be the first of *February*, in the 4th year of his reign, the court on demurrer held that the declaration was properly entitled, though plaintiff appeared in terms to have commenced his action before the cause of it had arisen.† 2 Dowl. & Ryl. 868.

* Where the rule to bring in the body, served on the 5th of July, expired on the second day of Michaelmas term: Held by BEST, C. J. & GASELLE, J. PARK & BUNNOURN, Js. *dis.* that the sheriff was not discharged by the plaintiff's having, on the 7th of July preceding, and previously to the justification of bail, consented to an order to stay proceedings on payment of debt and costs within a month. 2 Bingh. 366.

† It is no error to entitle the declaration of Michaelmas term generally, (which therefore relates to the first day thereof, November 6th,) though the cause of action is stated in it to have accrued on the 18th of November. 2 Bingh. 469. *Exch. Ch. in Er.*

CHAP. XVII.

After 'justify,' l. 24, p. 477, the author adds: And where the plaintiff declared *de bene esse*, and the defendant pleaded in abatement, before he had put in special bail, and the plaintiff, treating his plea as a nullity, signed interlocutory judgment, the court held it to be regular. 2 Dowl. & Ryl. 252.

After 'it,' l. 35, p. 488, 4, the author adds: And, in the Common Pleas, a defendant, under terms of pleading issuably, cannot assign special causes of demurrer, even though the causes assigned be matter of substance. 1 Bing. 379..

CHAP. XXI.

After note †, p. 564, add as a second note: Where an affidavit answered a rule nisi for setting aside proceedings for irregularity, with costs, but was written in a cramped and slovenly hand, the court on that ground refused to grant the costs of the application. 8 Dowl. & Ryl. 114.

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TO THE
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